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No. 11-

IN THE

Supreme Court of the United States

ROY M. JACOBS, II

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether inconsistent verdicts in a criminal proceeding deprive defendants of their constitutional right to due process of law by eliminating the requirement that the Government prove guilt beyond a reasonable doubt?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Roy M. Jacobs, II., respectfully requests that a writ of *Certiorari* issue to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the highest state court to review the merits of this case appears at Appendix A ("App.") 1a. - 33a, and is unpublished. The opinion of the Washington County Court of Common Pleas appears at App. 34a-71a, and is unpublished. The opinion of the Supreme Court of Pennsylvania denying a Petition for Allowance of Appeal appears at App. 72a, and is reported at *Commonwealth v. Jacobs*, 371 WAL 2010 (Pa. 2010).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania denying a Petition for Allowance of Appeal was entered on January 12, 2011. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: [N]or shall any State deprive any person of life, liberty, or property without due process of law[.]

U.S. Const. amend. XIV, §1.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

The Fifth Amendment to the United States Constitution provides, in pertinent part: No person shall be...deprived of life, liberty or property without due process of law[.]

U.S. Const. amend. V.

STATEMENT OF THE CASE

Petitioner, Roy M. Jacobs, II., was charged with, *inter alia*, two counts of homicide by vehicle in violation of 75 P.S. § 3732. Each count was identically premised upon the same theory, and the same evidence was used to establish guilt. The only distinction between the counts concerned the identity of the decedent who perished as a result of a motor vehicle accident. After a trial by jury, Petitioner was convicted of one count of homicide by vehicle and acquitted of the other. Both the Commonwealth and Pennsylvania state courts concede that Petitioner's convictions are the product of an inconsistent jury verdict. App. 7a-8a; 47a.

This Petition presents a novel issue of great importance: whether inconsistent verdicts in a criminal proceeding deprive defendants of their constitutional right to due process of law by eliminating the requirement that the Government prove guilt beyond a reasonable doubt. Petitioner is requesting that this Court reconsider its previous decisions in *Dunn v. United States*, 284 U.S. 390 (1932), and *United States v. Powell*, 469 U.S. 57 (1984), which permit a trier of fact to return inconsistent verdicts against a criminal defendant without limitation. Petitioner submits that reason, logic and experience warrant the specific relief herein requested.

The issue presented by this case is also of great national significance as an emerging minority of state supreme courts has determined that the rationale of *Dunn* and *Powell* offends criminal defendants' constitutional right to due process of law.

1. Factual Background

This case arises from a two-vehicle collision which resulted in the deaths of Robert Bernardini and Richard Morris. App. 2a. In the early morning hours of December 2, 2005, Petitioner and Mr. Bernardini were driving to the latter's residence in Petitioner's Ford Ranger pickup truck. *Id.* While traveling on Interstate 70, the truck crossed over the grass median into the eastbound lane and collided head-on with a vehicle driven by Mr. Morris. *Id.*

Upon impact, both Petitioner and Mr. Bernardini were ejected through the passenger-side door of the pickup truck. *Id.* Both Mr. Bernardini and Mr. Morris were pronounced dead at the scene of the accident. Petitioner sustained significant injuries, but ultimately recovered from the accident. *Id.*

Petitioner has steadfastly maintained that he was the passenger in the pickup truck that evening, and that Mr. Bernardini had been driving at the time of the accident. Thus, the major point of contention in this case concerned whether Petitioner or Mr. Bernardini operated the vehicle at the time of the accident. *Id.*

The Commonwealth theorized that Petitioner had been operating the pickup truck at the time of the accident, and that said operation resulted in the deaths of Mr. Bernardini and Mr. Morris. The indictment reflected this theory, charging Petitioner with, *inter alia*, two counts of homicide by vehicle, with each count corresponding to a decedent of the accident. *Id.* at 4a.-5a.

At trial, both the Commonwealth and defense proffered testimony from several expert witnesses in

the fields of accident reconstruction, forensic pathology, and physics. Based upon their review of the relevant data and evidence, the Commonwealth experts determined that Petitioner had been driving the pickup truck at the time of the accident, while the defense experts concluded that Petitioner was the passenger. *Id.*

Following trial, the jury convicted Petitioner of one count of homicide by vehicle in violation of 75 P.S. § 3732, a felony of the third degree (as to victim Richard Morris); and one count of driving under the influence of alcohol in violation of 75 P.S. § 3802(b), an ungraded misdemeanor, first offense, second tier. *Id.* at 5a-6a. Petitioner was also found guilty by the trial court on the summary offenses of careless driving, driving on roadways laned for traffic, and driving vehicle at safe speed. *Id.*, at 5a, fn.2. Petitioner was acquitted of all remaining charges, including the count of homicide by vehicle as to the other victim, Robert Bernardini, who was alleged to have been the passenger in Petitioner's vehicle during the accident. *Id.* at 5a.

2. The Decision of the Superior Court of Pennsylvania

On appeal to the Superior Court of Pennsylvania, Petitioner argued that the jury's rendering of inconsistent verdicts deprived him of his constitutional right to due process of law, thereby violating his Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution, as well as his comparable rights under the Pennsylvania Constitution. App. 6a-7a. Petitioner maintained that the justifications

underlying the *Dunn* and *Powell* decisions were insufficient to substantiate the subversion of his constitutional rights.

Relying upon precedent case law that applied the holdings in *Dunn* and *Powell*, the Superior Court affirmed Petitioner's convictions. *Id.* at 7a-8a.. The Court determined that inconsistent verdicts do not constitute sufficient grounds for judicial intervention in Pennsylvania. *Id.* Thus, although the jury's verdict was admittedly inconsistent, Petitioner was not entitled to relief on that basis.

3. The Order of the Pennsylvania Supreme Court

A Petition for Allowance of Appeal was filed in the Pennsylvania Supreme Court on July 16, 2010. Again, Petitioner argued that the inconsistent verdicts deprived him of the constitutional rights referenced herein. The Pennsylvania Supreme Court issued an Order denying the Petition for Allowance of Appeal on January 12, 2011. *Id.* at 72a.

REASONS FOR GRANTING THE WRIT

I. Inconsistent Verdicts in Criminal Cases Contravene a Defendant's Constitutional Right to Due Process of Law in Violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution

Inconsistent verdicts insult basic principles of due process and the fundamental requirement that the Government establish a criminal defendant's proof beyond a reasonable doubt. *See In re Winship*,

397 U.S. 358, 364 (1970). The problem of inconsistent verdicts has persisted since the inception of the United States criminal justice system. At common law, inconsistent verdicts were deemed invalid and contrary to law. *See* Steven T. Wax, *Inconsistent and Repugnant Verdicts in Criminal Trials*, 24 N.Y.L. Sch. L. Rev. 713, 732 (1979). This Court has previously implied that the issue of inconsistent verdicts does not involve or implicate a criminal defendant's constitutional rights. *See United States v. Powell*, 469 U.S. 57, 65 (1984). As the Iowa Supreme Court has recently noted, however, "the question of the validity of an inconsistent verdict...can be approached only with due regard to important constitutional concepts..." *State v. Halstead*, 791 N.W.2d 805, 808 (Iowa 2010).

Petitioner submits that the justifications underlying the principle of law espoused in *Dunn v. United States*, 284 U.S. 390 (1932) and *United States v. Powell*, 469 U.S. 57, are no longer applicable and/or sufficient to warrant continued adherence. In order to fully understand this argument, it is necessary to consider the genesis of this Court's rationale.

1. The Development of Supreme Court's Approach to Inconsistent Verdicts

Prior to 1932, the federal circuit courts were split on this issue. The Third Circuit followed the Eighth Circuit in holding that inconsistent jury verdicts on multiple count indictments could furnish an adequate basis for overturning a conviction. *Speiller v. United States*, 31 F.2d 682 (3rd Cir. 1929); *Boyle v. United States*, 22 F.2d 547 (8th Cir. 1927).

Conversely, the Second Circuit, the Sixth Circuit, and the Seventh Circuit all held that such inconsistent verdicts would not vitiate an otherwise valid conviction. *Seiden v. United States*, 16 F.2d 197 (2nd Cir. 1926); *Gozner v. United States*, 9 F.2d 603 (6th Cir. 1925); *Carrigan v. United States*, 290 F. 189 (7th Cir. 1923).

The Supreme Court first addressed this issue in *Dunn*, *supra*. In *Dunn*, the defendant was indicted on three counts: first, for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, second, for unlawful possession of intoxicating liquor and third, for the unlawful sale of such liquor. *Id.* at 391-392. The jury acquitted him on the second and third counts, but found him guilty on the first. *Id.* In an opinion authored by Justice Holmes, the Supreme Court affirmed the convictions by holding that "consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." *Dunn*, 284 U.S. at 393.

The rule promulgated in *Dunn* was premised upon two propositions. In line with the above-referenced rationale, the Court first expounded upon the theory that each count should be treated as a separate indictment. *Id.* at 393. As the Court theorized, had each of the counts been charged as a separate indictment, an acquittal on a single charge would not have given rise to a valid argument of *res judicata* as to the other. *Id.* The Court then transitioned its argument to hold that it would be unjust to permit a defendant greater rights simply because the counts were contained in a single indictment. *Id.* The second argument proffered by Justice Holmes was derived from the Second

Circuit's decision in *Steckler v. United States*, 7 F.2d 59 (2nd Cir. 1925), wherein the Court reasoned as follows:

> [t]he most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.

Dunn, 284 U.S. at 393, *citing Steckler*, 7 F.2d at 60.

Subsequent decisions rendered by this Court further defined the doctrine of *res judicata* as precluding the exact hypothetical situation that the *Dunn* Majority relied upon in support of its position. *See Sealfon v. United States*, 322 U.S. 575, 578-79 (1948)(wherein the Supreme Court definitively overruled the rationale underlying the first argument proffered in support of the *Dunn* opinion – mainly, that defendants confronted by successive indictments charging offenses stemming from the same conduct could not avail themselves of the *res judicata* doctrine); *see also Powell*, 469 U.S. at 64. In fact, as early as 1950, proponents of the federal rule on inconsistency acknowledged that this principle no longer provides viable support as posited by the United States Supreme Court in *Dunn*. *See* Alexander M. Bickel, *Judge and Jury – Inconsistent Verdicts in the Federal Courts*, 63 Harv. L.Rev. 649, 650 (1950). Subsequent decisions from federal circuit

courts confirmed this fact. *See, e.g., United States v. Carbone*, 378 F.2d 420, 422 (2nd Cir. 1968); *United States v. Maybury*, 274 F.2d 899, 902-903 (2nd Cir. 1960).

Thus, the only remaining justification for permitting inconsistent verdicts was the reasoning that any inconsistencies represent an exercise of jury lenity that should not be disturbed. *See Dunn, supra*; *see also Maybury*, 274 F.2d 899. The Alaska Supreme Court summarized this principle as follows:

> [s]ince their very origins, juries have had the power, if not the right, to act irrationally. In the context of inconsistent jury verdicts, the traditional power of irrationality is essential, since it permits a jury to express its desire to act leniently toward certain defendants by convicting on only one of several counts. Without such power, a jury would have no assurance that a desire on its part to have an accused treated leniently would be heeded by the court.

DeSacia v. State, 469 P.2d 369, 376 (Alaska 1970). Importantly, the crux of this rationale is based upon the *assumption* that inconsistent verdicts reflect the jury's exercise of leniency in favor of the accused. This assumption was reiterated by the Second Circuit in *Carbone*:

> [t]he very fact that the jury may have acquitted of one or more counts in a multicount indictment because of a

> belief that the counts on which it was convicted will provide sufficient punishment forbids allowing the acquittal to upset or even to affect the simultaneous conviction. * * * It is true, as both Judge Hand and Mr. Justice Holmes recognized, that allowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger.

Carbone, 378 F.2d at 422-23.

In the wake of *Sealfon*, *Carbone*, *Maybury*, and similar cases, the resultant ambiguity concerning the viability of the *Dunn* rationale was apparent. The United States Supreme Court again addressed the issue of inconsistent verdicts in *Powell*, 469 U.S. 57. The defendant in *Powell* was charged with, *inter alia*, conspiracy with intent to distribute narcotics, possession of narcotics with intent to distribute, and use of a telephone in committing these offenses. *Id.* at 59-60. The jury acquitted the defendant of the first two charges, but found him guilty of the offense related to use of a telephone in connection with the other felonies. *Id.* at 60.

The Supreme Court upheld the conviction, thereby reaffirming the rationale of *Dunn*. Although recognizing that the *res judicata* argument no longer supported its position, *id.* at 64, the Court maintained that there were still legitimate reasons

justifying the general principle set forth in *Dunn*. First, the Court determined that it was still unclear whether a defendant is harmed by inconsistent verdicts. *Powell*, 468 U.S. at 65. In this regard, the Court again relied upon the assumption that the inconsistent verdicts were merely a manifestation of the jury's exercising lenity in favor of the accused. *Id.* Furthermore, the Court was reluctant to sanction individualized challenges to jury verdicts in criminal proceedings. *Id.* at 66. The Court opined that such a system would be both imprudent and unworkable. *Id.* Finally, the Court determined that the process of review already afforded to criminal defendants provided a sufficient mechanism to guard against juries that would render a conviction out of passion or prejudice against the accused. *Id.* at 67.

2. State Supreme Courts and Legal Scholars Have Sharply Criticized the Rationale of *Dunn* and *Powell*

The United States Supreme Court emphasized that its decision in *Powell* was not based upon federal constitutional considerations, but only on its "supervisory powers over the federal criminal process." *Id.* at 65. Thus, state courts retain discretion to either accept or reject the *Powell* rationale in state criminal proceedings. *See Halstead*, 791 N.W.2d at 810. Most recently, the Iowa Supreme Court rejected the *Powell* decision and determined that permitting inconsistent verdicts was contrary to the constitutional protections afforded to criminal defendants. The *Halstead* court relied upon notable scholarly critiques of *Powell* in support of its decision. These legal scholars have assessed each of

the justifications set forth in *Powell* and determined that none provide a sufficient basis to warrant continued adherence to *Dunn's* approach to inconsistent verdicts.

a. Recognizing a Claim of Verdict Inconsistency will not Create an Unworkable or Imprudent System

As previously noted, the Supreme Court has expressed concerns that permitting challenges to inconsistent verdicts will create an unworkable or imprudent system that undermines the traditional secrecy and sanctity of jury deliberations. *Powell*, 469 U.S. at 66. However, the preeminent modern commentator on the subject of inconsistent verdicts, Eric Muller, has impugned this logic. Muller has described the Court's approach to inconsistent verdicts as "distressing." *See* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 Harv. L. Rev. 771, 834 (1998). According to Muller, the United States Supreme Court's concerns regarding an imprudent or unworkable system whereby courts would be required to probe jury deliberations does not justify tolerating obvious juror error. *Id.* Muller posits that recognizing the irrationality of an inconsistent verdict does not pose any significant risk to the traditional secrecy and sanctity of the jury. *Id.* at 817. Rather, "[a]n inconsistent verdict hands the reviewing court conclusive evidence of jury error on a platter." *Id.* In essence, an inconsistent verdict provides per se evidence of the jury's failure to adhere to the reasonable doubt standard. *Id.*

Presently, the *Dunn* decision constitutes an implicit sanctioning of juror carelessness and/or apathy. *See* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 Va. L. Rev. 253, 280 (1996). Furthermore, *Dunn* undermines the fundamental paradigm requiring the trier of fact to establish a criminal defendant's guilt beyond a reasonable doubt. According to Leipold, the approach in *Dunn* "deprives the defendant of valuable evidence that the jury failed to find proof of each element of the crime beyond a reasonable doubt, thereby increasing the risk of an erroneous conviction." *See Halstead*, 791 N.W.2d at 814, *citing* Leipold, 82 Va. L. Rev. at 279 n.99. Consequently, the potential for a compromise verdict under the *Dunn* rationale is "particularly troublesome." *Id.* at 280.

b. The Current System of Review is Inadequate to Rectify the Constitutional Harm Caused by Inconsistent Verdicts

In practical terms, appellate review of inconsistent verdicts in a criminal case is limited to challenging the sufficiency of the evidence. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court established a standard of review – commonly referred to as "sufficiency of the evidence" – requiring judges to assess the strength of the inculpatory evidence as a proxy for whether the jury honored the reasonable doubt standard. Although this standard of review provides a sufficient basis for relief in most criminal proceedings, the problem of inconsistent verdicts is beyond reprieve. As Muller explains:

> in most cases to which *Jackson* applies, there is no reason at all to suspect that the jury has violated the law. In contrast, an inconsistent verdict dashes any reason a court might have for believing, or even hoping, that the jury performed its function properly. In such a case, *Jackson* review of the sufficiency of the evidence provides no comfort that the defendant's due process rights were not violated.

Muller, 111 Harv. L. Rev. at 816. Muller further argues that subjecting inconsistent verdicts to a sufficiency of the evidence review violates the Sixth Amendment jury guarantee: "[t]o ask...whether some other, rational jury could have reached the result that a concededly irrational one did therefore violates the jury guarantee." *Id.* at 819.

Albert W. Alschuler is another prominent legal scholar who has critically analyzed the Supreme Court's reasoning that the current system of appellate review provides a sufficient mechanism of relief. *See Powell*, 469 U.S. at 67. Alschuler opines that the present structure of the judicial system is illogically constructed in that it provides extensive "front-end" controls on the trial process while simultaneously affording no similar protections on the "back-end" to address cases where the jury renders an inconsistent verdict. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 154-55; 229 (1989). This contention has been adopted by the court in *Halstead*: "[i]t is difficult to understand why we have

a detailed trial procedure, where the forum is elaborate and carefully regulated, and then simply give up when the jury confounds us." *Halstead*, 791 N.W.2d at 815. According to Alschuler, the message derived from continued adherence to *Dunn* is clear – it is "better that ten innocent defendants be convicted than that ten guilty defendants be denied the boon of unlawful jury nullification." Alschuler, 56 U. Chi. L. Rev. at 213 (1989).

Muller suggests that there are reasonable means to ensure that a defendant's constitutional rights are protected while maintaining the historical sanctity of the deliberative process. Muller, 111 Harv. L. Rev. at 821-22. He proposes that courts can apply a harmless error analysis, refuse to accept inconsistent verdicts, and possibly afford the defendant the option of retrying the counts to which inconsistent verdicts were rendered. *Id.* at 821-34.

c. *Dunn* is Premised Upon a Fatally Flawed and Illogical Assumption

As the Alaska and Iowa Supreme Courts have found, the most troubling aspect of the argument in support of *Dunn* is the assumption that inconsistent verdicts represent the jury's exercise of lenity in favor of criminal defendants. The *Halstead* court correctly noted that the approach in *Dunn* and *Powell* is only sensible if one operates under the assumption that all inconsistent verdicts are the product of jury lenity with respect to acquittals. *Halstead*, 791 N.W.2d at 814. However, *Halstead* recognized the naivety of such an approach, as it is equally plausible that the inconsistent verdict is the product of animus towards the accused rather than

the exercise of lenity in his or her favor. *Id.* Furthermore, "aside from the animus-lenity coin, the inconsistent verdict may be a result of mistake, confusion or compromise." *Id.* at 814-15.

The Alaska Supreme Court found this rationale equally troubling. *See DeSacia*, 469 P.2d 369. The *DeSacia* court questioned the logic of simply assuming that inconsistent verdicts were always the product of juror lenity in favor of the accused. Furthermore, the court found it improper to assume that permitting inconsistent verdicts in criminal trials only runs "the risk that an occasional conviction may have been the result of compromise," as contended by Justice Learned Hand and Justice Holmes in *Carbone*. *DeSacia*, 469 P.2d at 377, *citing Carbone*, 378 F.2d at 422-23. As the Alaska Supreme Court aptly noted, "[t]he truth is simply that we do not know, nor do we have any way of telling, how many inconsistent verdicts are attributable to feelings of leniency, to compromise, or, for that matter, to outright confusion on the part of the jury." *DeSacia*, 469 P.2d at 377.

A number of legal scholars have also criticized the baseless assumption upon which *Dunn* is premised. For instance, Muller asserts that "[a]lthough the Court optimistically guesses that inconsistent verdicts 'often are a product of jury lenity,' it has no way of knowing how often." Muller, 111 Harv. L. Rev. at 795. (Internal citations omitted). He condemns the Court's failure to acknowledge the significance of what it is willing to sacrifice in order to protect the *possibility* that the verdict is the exercise of lenity. *Id.* (Emphasis added). Moreover, the Court's assumption disavows the realistic possibility that the jury's verdict is the product of

confusion, compromise, or misunderstanding. *See Wax*, 24 N.Y.L. Sch. L. Rev. at 739.

3. An Emerging Number of State Courts Recognize the Flawed Reasoning Offered in Support of *Dunn* and *Powell*, and have thus Invalidated Inconsistent Verdicts in Criminal Proceedings

The majority of state courts that have considered the question of inconsistent jury verdicts in criminal cases have traditionally followed this Court's directive in *Powell* and *Dunn*. *See generally People v. Frye*, 898 P.2d 559, 569-70 (Colo. 1995); *People v. Jones*, 207 Ill.2d 122 (Ill. 2003); *Beattie v. State*, 924 N.E.2d 643, 649 (Ind. 2010); *State v. Brown*, 132 N.H. 321 (N.H. 1989). However, an emerging number of state courts have opted to deviate from this approach. A brief synopsis of a cross-section of these decisions is provided herein.

As previously discussed, the Alaska Supreme Court elected to deviate from this Court's approach in *Dunn* more than a decade prior to the *Powell* decision. *See DeSacia*, 469 P.2d 369. The *DeSacia* case is factually similar to the instant matter. The defendant in *DeSacia* was charged with two counts of manslaughter. *Id.* at 371. These charges stemmed from his operation of a motor vehicle that resulted in the deaths of two other individuals. *Id.* The elements of each offense were identical, and the only distinction between the counts concerned the identity of the deceased victim. *Id.* at 372-374. After a jury trial, he was convicted of one count and acquitted of the other. *Id.* at 371. The court declined to adhere to the reasoning set forth in *Dunn*, *supra*, holding that

the factually inconsistent verdict was infected with legal error and could not be affirmed. *Id.* at 378.

A decade after *DeSacia*, but prior to *Powell*, the New York Court of Appeals considered the applicability of *Dunn* to a case involving factually inconsistent verdicts. *See People v. Tucker*, 431 N.E.2d 617 (N.Y. 1981). In *Tucker*, the defendant was convicted on two counts of robbery and one count of possession of a loaded gun, but acquitted on two other counts of robbery. *Id.* Although affirming the convictions, the court qualified its holding by noting that the result would have been different had the convictions been legally inconsistent – that is, an acquittal on one crime that is a necessary element of an additional count of which the defendant is found guilty. *Id.* at 619.

The Florida Supreme Court recently adopted the approach set forth in *Tucker*; namely, recognizing a distinction between legally and factually inconsistent verdicts. *Brown v. State*, 959 So.2d 218 (Fla. 2007). In *Brown*, the defendant was convicted of felony murder despite having been acquitted of the felonies upon which that charge was based. *Id.* at 219-220. The court reversed the conviction and concluded that such inconsistent verdicts could not be tolerated. The court premised its decision, in part, on the notion of constitutional due process of law and the burden of proof borne by the state in criminal proceedings: "[the state, not the defendant, bears] the burden of ensuring parallel verdict forms for legally interlocking counts." *Id.* at 223.

Most recently, the Maryland and Iowa Supreme Courts have considered issues pertaining to inconsistent verdicts. *See Price v. State*, 405 Md. 10 (Md. 2008); *Halstead*, 791 N.W.2d 805. Both

jurisdictions have declined to follow the rule expressed in *Dunn* and *Powell*. The above-cited cases confirm that while the majority of state courts simply adopt the approach of *Dunn* and *Powell*, a significant minority have determined that some categories of inconsistent verdicts should not be permitted.

4. The Irrational Approach to Inconsistent Verdicts in Civil Proceedings

Although the instant matter concerns inconsistent verdicts in criminal proceedings, consideration of these principles in the context of civil litigation provides pertinent guidance on this issue. Neither *Dunn* nor *Powell* discussed the propriety of inconsistent verdicts in civil proceedings. *See* Bickel, 63 Harv. L. Rev. at 654 (recognizing that there is no civil equivalent to *Dunn* that precludes judicial intervention to rectify an inconsistent verdict). Although the Supreme Court has not directly addressed the issue, its decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), intimates that the Court is more inclined to intervene to prevent jury inconsistency in civil cases than in the criminal context. *See Halstead*, 791 N.W. 2d at 810(explaining that "[w]hile the law is not entirely clear in the civil context, *see, e.g.*, *City of Los Angeles v. Heller*, 475 U.S. 796, 804-05 (1986)(Stevens, J., dissenting), it appears that the United States Supreme Court is more likely to intervene to prevent jury inconsistency in civil cases than in the criminal context;") *see also* Bickel, 63 Harv. L. Rev. at 654. In *Heller*, the plaintiff filed a civil suit against the City of Los Angeles and an individual who was employed

as a police officer for the city. 475 U.S. at 797. The district court bifurcated the trials against the officer and the city, with the former trial preceding the latter. *Id.* After the jury returned a verdict in favor of the officer, the district court dismissed the case against the city, concluding that if the police officer had been exonerated by the jury there could be no basis for asserting liability against the city or the persons constituting its police commission. *Id.* at 798.

On appeal, the Ninth Circuit reversed the decision of the district court. The Supreme Court granted *Certiorari* and reinstated the district court's decision. In his dissenting opinion, Justice Stevens recognized that a necessary precondition for the Majority's decision is the "assumption...that there would be an inevitable inconsistency between the jury verdict of no liability for [for the officer] and a possible verdict of liability against the municipal entities." *Id.* at 801. Justice Stevens noted that "in the absence of such an inconsistency, the District Court's decision, and this Court's reinstatement of it, are simply inexplicable." *Id.*

The disparity in *Dunn's* application within the civil context has also been recognized by the Maryland Supreme Court, whose recent decisions reference this illogical distinction in support of a deviation from *Dunn* and *Powell* in criminal proceedings. *See, generally*, *Price v. State*, 405 Md. 10. The *Price* decision followed several recent cases from the Maryland Supreme Court that attempted to harmonize the historically disparate judicial practice of precluding inconsistent verdicts in the civil context while permitting the same in criminal proceedings. *Id.* at 21-22; *see also Southern Management v. Taha*, 378 Md. 461 (Md. 2003); *Galloway v. State*, 371 Md.

379 (Md. 2002). Recognizing the impropriety of a judicial system that affords civil litigants more protection than criminal defendants, the court stated the following:

> [m]oreover, to accept what occurred here would be to create different, harsher, standards in criminal cases than in civil cases. We are unwilling to afford less protection to the jury trial rights of a criminal defendant, whose very liberty, or even his or her life, is at stake, than to a civil litigant, where, generally, it is money that is at stake.

Price, 405 Md. at 22, *citing Galloway*, 371 Md. at 417; *see generally United States v. One Assortment of Firearms*, 465 U.S. 354, 358-359 (1984)(because of the difference in potential penalties, the criminal defendant is often afforded greater protection than the civil defendant).

The Maryland Supreme Court observed the hierarchical significance that our system of jurisprudence places upon criminal proceedings in light of the unique personal interests at stake: "our system accords greater procedural protections for the defendant than we give to either side in civil jury trials." *Price*, 405 Md. at 27. Accordingly, if there should be any difference in the manner in which inconsistent verdicts are considered in the civil or criminal context, "there should be less toleration of inconsistent jury verdicts in criminal cases than in civil cases." *Id.*

5. Judicial Distinctions in the Application of *Dunn* and *Powell* provide an Untenable and Illogical Framework

a. Factual Versus Legal Inconsistency

A number of courts that have considered this issue have attempted to draw a distinction between verdicts that are commonly characterized as "factually" as opposed to "legally" inconsistent. As previously noted, a factually inconsistent verdict is one where a jury renders different verdicts on crimes with distinct elements when there was only one set of proof given at trial, thus rendering the verdict seemingly illogical. *See Price*, 405 Md. at 35. The *DeSacia* case presents an issue of factually inconsistent verdicts.

A legal inconsistency, by contrast, occurs when "an acquittal on one charge is conclusive as to an element which is necessary to and inherent in a charge on which a conviction has occurred...." Wax, 24 N.Y.L. Sch. L. Rev. at 740. The Supreme Court of Rhode Island has further defined the concept of "legal inconsistency," stating that "if the essential elements of the count[s] of which the defendant is acquitted are identical and necessary to prove the count of which the defendant is convicted, then the verdicts are inconsistent." *State v. Arroyo*, 844 A.2d 163, 171 (R.I. 2004). Similarly, the Illinois Supreme Court provides the following example of legally inconsistent verdicts: "[v]erdicts of guilty of crime A but not guilty of crime B, where both crimes arise out of the same set of facts, are legally inconsistent when they necessarily involve the conclusion that the same essential element or elements of each crime were

found both to exist and not to exist." *See People v. Frias*, 99 Ill.2d 193 (1983).

Although it would appear that the verdicts in the case at bar are "factually inconsistent," a more thorough review reveals that these verdicts represent a hybrid of legal and factual inconsistency. A discussion of the Florida Court of Appeals' decision in *Naumowicz v. State*, 562 So.2d 710 (Fla. Dist. Ct. App. 1990) clarifies this point. In *Naumowicz*, the defendant was operating a vehicle under the influence of alcohol when she collided with another vehicle. *Id.* at 711. Both her passenger and the driver of the other vehicle were killed. She was charged with two counts of DUI manslaughter, with each count pertaining to one of the deceased victims. *Id.* The jury returned a guilty verdict of one count with respect to the passenger in her vehicle, but not guilty as to the remaining count. *Id.* Affirming the conviction, the Florida Court of Appeals explained that the jury's verdict constituted a factual rather than a legal inconsistency.

> Here, the jury received evidence that both [the defendant] and Work, one of the decedents with whose death she was charged, *operated their vehicles in a manner which contributed to the fatal accident*. No such evidence was presented as to decedent Juhacz. It is therefore our opinion, after a review of the record and careful consideration of the arguments presented by the parties, that the jury's acquittal as to Work's death may not have been a finding that his conduct was the sole cause of the

> accident, but could have been an exercise of its power to pardon [the defendant] with regard to that death.

Id. at713. (Emphasis added).

Petitioner respectfully submits that the facts of this case are distinguishable from those present in *Naumowicz* in one crucial aspect. Specifically, there is no dispute that the defendant in *Naumowicz* was driving the vehicle at the time of the accident. The only point of contention in *Naumowicz* concerned whether the driver of the other vehicle contributed to the fatal accident to such a degree that the defendant was justifiably acquitted. *Id.* Here, there was no argument that the driver of Petitioner's vehicle was not responsible or culpable for causing the deaths of both decedents. Rather, the only issue concerned the material element of who was operating the vehicle at the time of the accident. In finding Petitioner guilty of one count of homicide by vehicle and not guilty of the other, the jury essentially determined that Petitioner was the driver in one instance and not the other. Such a finding constitutes a legal inconsistency. As discussed more fully, *infra*, however, a determination as to whether the verdicts in this case constitute a factual or legal inconsistency is unnecessary.

b. Judge Versus Jury

In addition to the distinction drawn between legally and factually inconsistent verdicts, some jurisdictions have considered whether disparate treatment is appropriate where the inconsistent verdict is the product of a direct judicial action as

opposed to a jury verdict. This distinction involves inconsistent verdicts that are rendered by a judge after a bench trial rather than a jury. In *Harris v. Rivera*, 454 U.S. 339 (1981), which was decided prior to *Powell*, this Court addressed this issue for the first time. *Harris* involved three co-defendants who were each prosecuted for robbery and theft offenses. After a bench trial, the court found one of the defendants not guilty of all charges, and the other two defendants guilty of three counts each. Based upon the evidence presented, these verdicts were patently inconsistent. *Id.* at 340. The United States Supreme Court determined that the inconsistent verdicts rendered by the trial judge did not present sufficient grounds for relief under those particular circumstances.

The *Harris* decision was premised primarily upon the fact that the federal district court exceeded the scope of its jurisdiction by reversing a state court judgment. *Id.* at 342-343. This jurisdictional component was a key distinguishing factor between the situation presented in *Harris* and the issue considered by the Second Circuit Court of Appeals in *Maybury, supra.* The specific issue in *Maybury* concerned whether the defendant in a federal bench trial could be subjected to inconsistent verdicts. *Maybury*, 274 F.2d at 901. The Second Circuit held that inconsistent findings issued by a judge on different charges against a defendant in a single trial cannot stand. *Id.* Several courts have adopted the ideology set forth in the *Maybury* case and have either reversed or remanded a judge's guilty finding when it was inconsistent with a finding of not guilty on a separate charge at issue in the same trial. *See, e.g., State v. Meyer*, 17 Kan. App.2d 59, 70-71 (Kan.

App. 1992)(reversing conviction of issuing forged instrument because defendant also found not guilty of forging same instrument); *State v. Williams*, 397 Md. 172, 190 (Md. 2007)(reversal of convictions for attempted robbery with dangerous weapon and assault because defendant found not guilty of possessing handgun allegedly used); *Shell v. State*, 307 Md. 46, 57-58 (Md. 1986)(reversing conviction of use of handgun in commission of felony because defendant was found not guilty of underlying felony); *People v. Williams*, 99 Mich. App. 463, 464-465 (Mich. App. 1980)(reversing conviction because defendant was found not guilty of factually related charge); *Akers v. Commonwealth*, 31 Va. App. 521, 530-532 (Va. App. 2000)(reversing conviction of unlawful wounding because defendant was found guilty of lesser included offense of factually linked charge).

Attempting to distinguish cases based upon factual versus legal inconsistency, or between trials by jury or a judge, undermines the importance of the protections that were intended to be afforded to criminal defendants by the United States Constitution. Any distinguishing characteristics that may be identified cannot present a sufficient basis to warrant disparate treatment. Rectifying the problem presented by inconsistent verdicts cannot be achieved through the utilization of inconsistent approaches or theories. The Fourteenth Amendment ensures that all criminal defendants are entitled to fundamental fairness and due process of law. *In re Winship*, 397 U.S. at 364. Furthermore, each individual charged with a crime is entitled to have his or her guilt proven to a trier of fact beyond a reasonable doubt. While it is true that the judicial

system affords defendants a choice in some instances between having the matter decided by either a judge or a jury of peers, the standards of fairness by which that individual is judged and through which justice is effectuated should not be different. Such disparate standards are found neither in the express language of the Constitution nor in its historical meaning or purpose.

CONCLUSION

The reasonable doubt standard is necessary in order to command the respect and confidence of the community in applications of the criminal law. *Jackson*, 443 U.S. 307. It is essential that this constitutional protection not be diluted by a standard of proof that leaves citizens questioning whether an innocent man has been condemned. *In re Winship*, 397 U.S. at 364. It is also important in our free society that each individual maintain confidence that the Government cannot adjudge him or her guilty of a criminal offense without convincing the trier of fact as to guilt with utmost certainty. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Permitting a conviction to stand despite an undeniable aberration of the law contravenes the principles upon which this system is premised. This indignation is especially troubling when considering that the compelling justification offered in support of subverting one's constitutional rights is an assumption that the jury has exercised lenity in favor of the accused. While one can appreciate the concerns expressed in *Powell* regarding judicial efficiency and a general reservation against injecting judicial review into juror deliberations, *see Powell*,

469 U.S. at 66, simply turning a blind-eye is not a viable solution. As the Iowa Supreme Court noted, "[w]hen liberty is at stake, we do not think a shrug of the judicial shoulders is a sufficient response to an irrational conclusion. We are not playing legal horseshoes where close enough is sufficient." *Halstead*, 791 N.W.2d at 815.

Irrespective of the jury's true reason or motivation, a negotiated verdict is itself a compromise of the reasonable doubt standard; in essence, a verdict of conviction reached through compromise and/or lenity is a verdict of guilty that is not supported by belief beyond a reasonable doubt. *See* Muller, 111 Harv. L. Rev. at 796; *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)(holding that "[i]t would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty;" rather, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"). Adherence to a rule that sanctions this practice will undoubtedly undermine society's confidence in the sanctity of the criminal justice system.

The time has come to consider whether continued application of the rationale set forth in *Dunn* and *Powell* deprives criminal defendants of their constitutional right to due process of law. Petitioner respectfully requests that this Honorable Court determine that inconsistent verdicts violate a criminal defendant's constitutional right to due process of law and, as such, cannot be tolerated.

Respectfully, Petitioner requests that a writ of *Certiorari* be issued to the Superior Court of Pennsylvania.

Respectfully Submitted,

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J. A09024-10

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
ROY M. JACOBS, II,	:	
Appellant	:	No. 639 WDA 2009

Appeal from the Judgment of Sentence of April 1, 2009, in the Court of Common Pleas of Washington County, Criminal Division, at No. CP-63-CR-0002060-2007.

BEFORE: BENDER, BOWES, and COLVILLE[1], JJ.

MEMORANDUM: FILED: JUNE 16, 2010

Roy Jacobs, II, appeals from the judgment of sentence imposed by the trial court of two years and three months to four and one-half years imprisonment following his conviction of homicide by vehicle and driving under the influence of alcohol or

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[1] Retired Senior Judge assigned to the Superior Court.

controlled substance ("DUI"). After careful review, we affirm.

This case arises from a two-vehicle collision which resulted in the deaths of Robert Bernardini and Richard Morris. In the early morning hours of December 2, 2005, Appellant and Mr. Bernardini were driving on Interstate 70 in Washington County, Pennsylvania, in Appellant's Ford Ranger pickup truck. The truck crossed over the grass median into the eastbound lane of Interstate 70 and collided head-on with a Cadillac driven by Mr. Morris. Upon impact, both Appellant and Mr. Bernardini were ejected from the passenger side door of Appellant's truck. Mr. Bernardini's body was then propelled against a guardrail approximately thirty feet behind the resting place of Mr. Morris' Cadillac. Mr. Bernardini sustained crushing injuries as a result of the accident and was pronounced dead at the scene. Mr. Morris also was killed on impact and had to be extricated from his vehicle using the Jaws of Life. The dispute at trial centered on whether Appellant or Mr. Bernardini was driving the Ford Ranger at the time of the accident.

The testimony at trial revealed that prior to the accident, Appellant and Mr. Bernardini arranged to meet at the Rhythm House in Bridgeville, Pennsylvania, to attend a party hosted by the Washington Wild Things, a local independent-league baseball team. Mr. Bernardini, who was accompanied by Patricia Shannon Terrell and drove Ms. Terrell's vehicle, proceeded to. The Rhythm House where they met Appellant. After

approximately forty-five minutes, Appellant, Mr. Bernardini, and Ms. Terrell agreed to continue their night at Auggie's Roadhouse ("Auggie's"), a local establishment in Washington County, Pennsylvania.

Ms. Terrell testified that she and Mr. Bernardini followed Appellant to Auggie's. According to Ms. Terrell, Mr. Bernardini telephoned Appellant during the course of the ride to inquire if Appellant was okay because Appellant "was driving erratic[ally], all over the road." N.T., 11/17/08, Volume I, at 148. Once at Auggie's, Ms. Terrell observed that Appellant continued to consume alcohol and noted that he appeared intoxicated. Just prior to midnight, Ms. Terrell indicated to Mr. Bernardini that she needed to drive home. Before leaving, she questioned Mr. Bernardini about how he was going to travel home. Mr. Bernardini informed her that he would ride with Appellant. A brief argument ensued between the two over this issue, with Mr. Bernardini stating he had seen Appellant worse and that Mr. Bernardini would not drive Appellant's truck.

Additionally, while at Auggie's, Mr. Bernardini encountered Brian Joseph, an acquaintance he knew from his prior service in the United States Marine Corp. Mr. Bernardini introduced Mr. Joseph and Appellant to one another and Mr. Bernardini and Mr. Joseph engaged in conversation. Mr. Joseph recalled that Ms. Terrell and Mr. Bernardini had a "heated discussion" about how Mr. Bernardini would be getting home that evening. ***Id.*** at 183. He also noted that Appellant appeared intoxicated

throughout the evening.

Importantly, Mr. Joseph exited the establishment with Appellant and Mr. Bernardini and observed Appellant enter the driver's side door of his own pickup truck. Mr. Joseph, who was a passenger in another vehicle, stated that he and his friend followed Appellant for a short distance, but then pulled counterclockwise after impact with the Cadillac and striking Mr. Bernardini as he exited the vehicle causing him to land thirty feet behind the point of impact. In support of this theory, Dr. Cannon noted that the truck had rear panel damage, which did not appear to have occurred as a result of the collision with the Cadillac.

Dr. Cannon's findings also rested on the discovery of the trace amount of Mr. Bernardini's blood on the right side of the passenger side airbag. Dr. Cannon asserted that based on the principal direction of force from the collision, the driver of the truck could not have come in contact with the passenger side airbag.

In contrast, Dr. Karl Williams, a forensic pathologist, and Daniel Aerni, an expert in the field of accident reconstruction and engineering, testified on behalf of Appellant. Both of Appellant's experts concluded that Appellant was the passenger in the truck. Dr. Williams opined that the injuries sustained by Mr. Morris and Mr. Bernardini were similar, the pattern of injuries Mr. Bernardini experienced were not consistent with a secondary impact with the truck, and that the right side

injuries incurred by Appellant were consistent with the types of injuries a passenger would have suffered.

Further, he asserted that reliance on the trace amount of Mr. Bernardini's blood on the right side of the passenger airbag as being indicative of Appellant having been the driver was misplaced. In addition, Dr. Williams testified that the resting position of the bodies at the accident scene was supportive of Appellant having been a passenger.

Mr. Aerni agreed that the location of the bodies at the scene indicated that Appellant was seated in the passenger's seat at the time of the collision. According to Mr. Aerni, based on the rotation of the truck after the point of impact, it would have been unlikely for the passenger to be ejected from the vehicle into the guardrail. Based on a computer simulation of the crash conducted by Mr. Aerni, he believed a secondary impact occurred between the two vehicles, explaining the damage Dr. Cannon opined resulted from Mr. Bernardini, being struck by the rotating truck.

Following trial, the jury convicted Appellant of one count of homicide by vehicle, 75 Pa.C.S. § 3732, and one count of DUI, 75 Pa.C.S. § 3802(b).[2] The jury acquitted Appellant of two counts of homicide by

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[2] The trial court also found Appellant guilty of the summary offenses of careless driving, driving on roadways laned for traffic, and driving vehicle at safe speed.

vehicle while DUI, one count of general impairment DUI, and one count of homicide by vehicle relative to Mr. Bernardini.

A pre-sentence investigation ("PSI") was conducted and the trial court sentenced Appellant to serve two to four years imprisonment on the charge of homicide by vehicle and a consecutive term of incarceration of three to six months on the charge of DUI. Appellant filed a timely post-sentence motion, which the trial court denied. This appeal followed.[3]

Appellant now presents the following questions for our consideration:

I. Whether the verdict in the case at bar is inconsistent and/or not sustained by sufficient evidence.

II. Whether the trial court committed reversible error when it determined that Appellant's convictions are [not] against the weight of the evidence.

III. Whether the trial court abused its discretion, thereby committing reversible error, when it rendered the following evidentiary rulings: (1) Limiting the scope of defense counsel's cross-examination of

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[3] The trial court ordered Appellant to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied and the trial court authored a Rule 1925(a) opinion.

Commonwealth witness Timothy Warco; (2) permitting Commonwealth expert witness

Douglas Bartoe to introduce a narrative

IV. portion of his conversation with Appellant into evidence at trial; (3) permitting Commonwealth expert witness Douglas Bartoe to introduce a prior consistent statement of Brian Joseph into evidence; (4) qualifying Dr. Joel Cannon as an expert in the field of accident reconstruction and permitting him to proffer expert testimony in this regard; and (5) limiting the scope of defense counsel's [direct] examination of Christine Blain.

V. Whether the trial court abused its discretion in imposing a sentence within the aggravated guidelines range.

Appellant's brief at 3-4.

Appellant's initial issue raises two distinct claims: first, whether the verdict can be sustained because it is inconsistent; and second, if sufficient evidence was introduced to find Appellant guilty of the aforementioned charges. It is well settled in Pennsylvania that an inconsistent verdict is not grounds for a new trial. ***Commonwealth v. Petteway,*** 847 A.2d 713, 718 (Pa.Super. 2004); ***Commonwealth v. Frisbie,*** 889 A.2d 1271 (Pa.Super. *2005);* ***Commonwealth v. States,*** 938 A.2d 1016 (Pa. 2007). Thus, although the jury verdict

in this case was inconsistent, Appellant is not entitled to relief on that basis. Appellant's argument is that other jurisdictions have decided that an inconsistent verdict is sufficient to set aside a conviction; nevertheless, we are bound by prior precedent. Having decided that Appellant's inconsistent verdict claim must fail, we next address his sufficiency of the evidence argument.

In reviewing a sufficiency of the evidence claim, our standard of review is well settled. We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. ***Commonwealth v. Sibley,*** 972 A.2d 1218 (Pa.Super. 2009). Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail. ***Id.*** The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part or none of the evidence presented. ***Id.*** It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. ***Commonwealth v. Jones,*** 954 A.2d 1194 (Pa.Super. 2008).

Appellant challenges the finding that he was the driver of his truck at the time of the accident. Hence, in reviewing his sufficiency of the evidence claim, we focus our analysis on whether the

Commonwealth proved Appellant was driving the truck when it collided with Mr. Morris' Cadillac. In leveling his argument, Appellant recognizes that a sufficiency claim cannot succeed based upon a mere disagreement or discrepancy in the accounts of the witnesses. However, Appellant contends that the testimony of the Commonwealth's expert witnesses was so contradictory on the essential issues that the jury should not have been permitted to decide the case because any findings were the result of a mere guess.

The Commonwealth counters that although its experts disagreed on some minor details, such as whether the persons in the truck collided with the passenger side door before being ejected from the truck,[4] what impact caused the injuries to Mr. Bernardini,[5] and how Mr. Bernardini arrived at his final resting place,[6] the Commonwealth's experts,

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[4] Corporal Bartoe opined that Mr. Bernardini collided with the passenger side door before being ejected, while Dr. Cannon determined that both Appellant and Mr. Bernardini were thrust from the vehicle without contacting the inside of the passenger door.

[5] Dr. Leon Rozin, a forensic pathologist, concluded that the injuries to Mr. Bernardini were the result of his coming into contact with the deployed airbag. However, Dr. Cannon believed that the injuries occurred when Mr. Bernardini impacted with the truck after being expelled from the vehicle.

[6] Dr. Cannon, as noted *supra*, found that the truck struck Mr. Bernardini as it rotated, which caused his body to be vaulted

Corporal Bartoe and Dr. Cannon, agreed on the finding that Appellant was driving the truck at the time of the accident.

Additionally, the expert testimony in this case did not stand-alone. The prosecution supplemented that testimony with the testimony of both Ms. Terrell and Mr. Joseph. Ms. Terrell offered circumstantial evidence that Mr. Bernardini insisted that he would not drive Appellant's truck. More importantly, Mr. Joseph testified that just prior to the accident, Appellant, not Mr. Bernardini, entered the driver's side door of his truck, and that he observed Appellant driving the truck just before the accident occurred. Thus, while the Commonwealth's expert witnesses disagreed as to how Appellant and Mr. Bernardini were propelled from the truck after impact, both expert witnesses agreed that Appellant was the driver of the vehicle.

Keeping in mind our standard of review and viewing the evidence in a light most favorable to the Commonwealth, we hold that the prosecution introduced sufficient evidence to establish Appellant drove the vehicle when the accident occurred. As Appellant has not challenged the evidence with respect to the other elements of the crime, we conclude that sufficient evidence existed to prove Appellant guilty beyond a reasonable doubt of both

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toward the guardrail resulting in Mr. Bernardini's impact with that guardrail some thirty feet behind the point of impact of the two vehicles. Corporal Bartoe, however, stated he did not know whether Mr. Bernardini collided with the truck or the Cadillac.

homicide by vehicle and DUI.

The next issue asserted by Appellant is that the trial court erred in finding that the verdict was not against the weight of the evidence. Appellant raised the issue in a post-sentence motion and included it in his Rule 1925(b) statement; hence, the issue is properly before this Court.

Appellant contends that the testimony of Mr. Joseph and Ms. Terrell was unreliable and contradictory. In support of his argument, Appellant points to Mr. Joseph and Ms. Terrell having stated that Appellant was intoxicated but that Mr. Bernardini was not, even though Mr. Bernardini's BAC at the time of the accident was .189%. Additionally, Appellant asserts, "Mr. Joseph contradicted his own version of events." Appellant's brief at 38. Appellant argues that Mr. Joseph was unsure of the direction that Appellant's vehicle was facing in the parking lot, a fact important in determining whether Appellant entered the driver's seat or the passenger seat.

Further, Appellant posits that Mr. Joseph's testimony at the preliminary hearing and trial was inconsistent regarding his conversation with Mr. Bernardini prior to Mr. Bernardini entering Appellant's truck. According to Appellant, at the preliminary hearing, Mr. Joseph testified that he spoke over the physical body of the truck Mr. Joseph was riding in and not over the running of the engine of that truck. At trial, Mr. Joseph testified that he spoke neither over the body of the truck or over a

running engine.

In maintaining his argument, Appellant quotes from the preliminary hearing transcript; however, that transcript does not appear in the certified record before us.[7] Nevertheless, Mr. Joseph did testify at trial that he was unsure if the preliminary hearing question regarded speaking over the physical truck or the running of the engine. We also note that the question referenced in Appellant's brief was, "You're shouting over your truck and you're talking?" The response by Mr. Joseph was, "More or less. Nothing was running at that point." This answer is not contradictory to Mr. Joseph's later testimony; rather, he could have been answering that he was talking with Mr. Bernardini, not that he was shouting over the physical body of the truck he was riding in. In addition, Mr. Joseph consistently stated that the engine of the vehicle he was standing next to was not engaged. Appellant continues that Ms. Terrell's testimony was unreliable and inconsistent. At trial, Ms. Terrell related that she left work at 4:30 p.m. on December 1, 2002, and arrived at Mr. Bernardini's residence around 9:00 p.m. She further stated that Appellant appeared at Mr. Bernardini's home ten minutes later with a beer in his hand and

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[7] The relevant portion of the preliminary hearing transcript is included in the reproduced record; however, it is well-settled that omissions from the certified record may not be remedied by inclusion of the (cont'd) material in the reproduced record. ***Tayar v. Camelback Ski Corp.***, 957 A.2d 281 (Pa.Super. 2008).

remained there until approximately 9:45 p.m. Ms. Terrell testified that she and Mr. Bernardini met Appellant at the Rhythm House between 10:20 and 10:30 p.m., before proceeding to Auggie's at 11:00 p.m. While driving to Auggie's, Ms. Terrell conveyed that Mr. Bernardini phoned Appellant and inquired if Appellant was okay due to Appellant weaving across the roadway.

Ms. Terrell claimed that she informed Corporal Bartoe of this information. However, Corporal Bartoe testified that Ms. Terrell originally informed him .that she left work at 10:00 p.m. and she and Mr. Bernardini did not arrive at the Rhythm House until 11:00 p.m. Ms. Terrell did not discuss with Corporal Bartoe having seen Appellant at Mr. Bernardini's house earlier in the evening or of the phone conversation she witnessed. In addition, Appellant posits that Ms. Terrell could not explain a picture text message of Appellant at the Rhythm House sent at 9:20 p.m.

The Commonwealth counters that the jury "chose to believe the evidence presented by the Commonwealth, as well as the logical inferences derived therefrom." Commonwealth's brief at 34. According to the Commonwealth, the jury freely reconciled "any purported differences in the testimony of the Commonwealth's witnesses, as well as [Appellant's] witnesses." ***Id.*** at 35.

The role of this Court in evaluating a weight of the evidence claim is limited. We review only whether the trial court abused its discretion. Where

conflicting evidence exists, and because the credibility of the witnesses is solely the province of the fact-finder, if the jury's findings are supported by the record, the trial court's denial of a motion for a new trial will not be disturbed. ***Commonwealth v. Diggs,*** 949 A.2d 873 (Pa. 2008).

> We may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003). Hence, a trial court's denial of a post sentence motion "based on a weight of the evidence claim is the least assailable of its rulings." ***Diggs, supra*** at 880.

The trial court, in evaluating Appellant's weight of the evidence claim, opined:

> [T]he evidence offered to support a verdict of guilt was not so unreliable and/or contradictory as to make any verdict based thereon pure conjecture.

> The evidence of the case, specifically the testimony of Mr. Joseph, establishes that the defendant was driving his vehicle after imbibing alcohol at the Rhythm House and Auggie's. The evidence further proves that the defendant's reckless driving while under the influence of alcohol resulted in a car accident that directly led to the death of Richard Morris.

Trial Court Opinion, 8/19/09, at 10 (citations omitted). We agree. The jury, acting as the fact-finder, was free to believe all, part, or none of the testimony of the witnesses and chose to believe the evidence proffered by the Commonwealth that Appellant was operating the vehicle. Along with the additional testimony of record, the evidence presented that Mr. Joseph observed Appellant enter the driver's side of Appellant's truck and witnessed Appellant drive out of the parking lot minutes before the crash, supports the jury's findings. Conflicts in the evidence and contradictions in the testimony of any witnesses are for the jury to resolve. ***Commonwealth v. Tharp,*** 830 A.2d 519, 528 (Pa. 2003). As we conclude that the trial court's decision does not shock one's sense of justice, we find that Appellant's weight of the evidence claim must fail.

Appellant's third issue is that the trial court committed reversible error by: (1) limiting the scope of defense counsel's cross-examination of Commonwealth witness Timothy Warco; (2) permitting Commonwealth expert witness Douglas

Bartoe to introduce a narrative portion of his conversation with Appellant into evidence at trial; (3) permitting Commonwealth expert witness Douglas Bartoe to introduce a prior consistent statement of Brian Joseph into evidence; (4) qualifying Dr. Joel Cannon as an expert in the field of accident reconstruction and permitting him to proffer expert testimony in this regard; and (5) limiting the scope of defense counsel's cross-examination of Christine Blain.

The admissibility of evidence is a matter solely within the discretion of the trial court, and this Court will reverse an evidentiary ruling only when a clear abuse of discretion has occurred. ***Commonwealth v. Schoff,*** *911*A.2d 147 (Pa.Super. 2006). "Abuse of discretion is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." ***Commonwealth v. Aikens,*** 990 A.2d 1181, 1184 - 1185 (Pa.Super. 2010).

The first evidentiary challenge Appellant raises is that the trial court erred in limiting the scope of defense counsel's cross-examination of Coroner Timothy Warco. During direct examination, Coroner Warco testified that in determining Mr. Bernardini and Mr. Morris' cause and manner of death, he relied upon the findings of Dr. Leon Rozin, his chief pathologist, When trial counsel for Appellant questioned Coroner Warco about whether Dr. Rozin determined who the driver of the truck was

during the accident, Coroner Warco testified that he made his decision after conferring with Corporal Bartoe. Trial counsel then inquired into the conversation that Coroner Warco had with Corporal Bartoe prior to Coroner Warco making his findings. The prosecution objected that the question exceeded the scope of direct examination because the Commonwealth did not inquire into the cause and manner of death of the decedents and the answer would be inadmissible hearsay. The trial court sustained the objection.

Appellant contends that because the Commonwealth asked Coroner Warco about his duties, and those duties included speaking with Corporal Bartoe and Dr. Rozin, such questioning was within the scope of direct examination. Furthermore, Appellant posits that the questioning would not have led to inadmissible hearsay evidence being introduced, as he was not offering the evidence to prove the truth of the matter asserted namely, that Appellant was the driver of the truck.

First, we note that Appellant was not seeking information regarding the cause and manner of death as contended by the Commonwealth, nor was Appellant seeking the witness's opinion about the cause and manner of death. Secondly, Appellant clearly was not introducing Corporal Bartoe's statement to Coroner Warco to demonstrate that Appellant was driving the vehicle; rather, the evidence was being sought to indicate that a conversation occurred between Coroner Warco and Corporal Bartoe. "When a witness testifies that

someone said something to him and the purpose is not to show that what was said was true but that the statement was made, the testimony is not hearsay but instead a verbal act." ***Commonwealth v. Jones,*** 543 A.2d 548, 550 (Pa.Super. 1988). Furthermore, an out-of-court statement is not hearsay if the statement is being offered to show the effect of the statement on the listener. ***In re Shahan,*** 631 A.2d 1298 (Pa.Super. 1993).

In the present case, Corporal Bartoe's statement would have been introduced to show its effect on Coroner Warco and Dr. Rozin in making their findings. Accordingly, the trial court erred in not permitting trial counsel to . question Coroner Warco about his conversation with Corporal Bartoe. Nevertheless, we agree with the Commonwealth's position that any such error was harmless.

> An error will be deemed harmless if: "(1) the error did not prejudice the defendant or the prejudice was *de minimus;* or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Markman, 916 A.2d 586, 603 (Pa. 2007). In the instant case, Appellant specifically cross-examined Corporal Bartoe about meeting with Coroner Warco and their conversation. Corporal Bartoe testified that within twenty-four hours of the accident, he indicated to Coroner Warco that he believed Appellant was driving the vehicle at the time of the accident. Hence, the information that Appellant sought to introduce by means of cross-examination of Coroner Warco was introduced through Appellant's questioning of Corporal Bartoe. The jury, therefore, was aware that prior to conducting an extensive investigation, Corporal Bartoe informed the coroner that he believed Appellant had driven the truck and that the coroner relied on this information in making his findings. Accordingly, the jury was informed of Appellant's theory that Corporal Bartoe's investigation "may have been skewed to substantiate his theory of the case." Appellant's brief at 43.

The second evidentiary position Appellant sets forth is that the trial court erred in permitting Corporal Bartoe to read his summary of a conversation he had with Appellant. On direct examination, Corporal Bartoe offered testimony regarding an interview he conducted with Appellant shortly after the accident, stating that Appellant never informed him that he was at Auggie's. Corporal Bartoe did not read into evidence any portion of his police report.

During cross-examination, Appellant inquired into the substance of that interview, questioning

Corporal Bartoe whether Appellant was sedated and if Appellant discussed being at Auggie's. Defense counsel did not read from the police report nor did Corporal Bartoe, although counsel requested that Corporal Bartoe utilize the report to refresh his recollection. Subsequently, the Commonwealth on re-direct sought to introduce the narrative portion of Corporal Bartoe's police report into evidence to demonstrate that Appellant had not discussed being at Auggie's. Counsel objected and was overruled. In its Rule 1925(a) opinion, the trial court stated that defense counsel opened the door to the introduction of the narrative as an admission of a party opponent, finding that Appellant offered part of the conversation between Appellant and Corporal Bartoe.

While we agree that when one party *offers* part of a conversation, the other party may bring out the balance, we cannot agree that the narrative portion of the police report was a conversation. Rather, it was a statement made and authored by Corporal Bartoe based upon his recollection of what was said during his interview of Appellant. The narrative was not a statement made by Appellant. In contrast, the report appears to have contained a verbatim recordation of the interview, which would have included statements made by Appellant. Hence, we disagree with the trial court's rationale for admitting the narrative portion of the report.

Nevertheless, we find that the trial court did not err in admitting the narrative as it was not being introduced for the truth of the matter asserted in the

narrative, *i.e.*, that Appellant was or was not at Auggie's, but was introduced to demonstrate that Appellant never stated that he was at Auggie's. Moreover, the prosecution could have introduced the report under Pa.R.E. 803(6), as a record of regularly-conducted activity. ***See Commonwealth v. Shaffer,*** 763 A.2d 411 (Pa.Super. 2000) (finding Pennsylvania State Police report would have been admissible as business record).[8] Commonly referred to as the business records exception, Pa.R.E. 803(6), provides:

> **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term "business"

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[8] ***Shaffer*** incorrectly cited the applicable rule as Pa.R.E. 806(6), rather than Pa.R.E. 803(6).

> as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Pa.R.E. 803(6). As the report was made by Corporal Bartoe during or shortly after his interview of Appellant from information given to him by Appellant and was a record regularly kept by the Pennsylvania State Police, the report properly falls under the business record exception.[9] Additionally, the statements contained within the report by Appellant, if being introduced for the truth of the matter asserted, would fall under the purview of the admission of a party opponent hearsay exception, thereby meeting the double hearsay rule. **See** Pa.R.E. 805. Importantly, Appellant also was provided with an opportunity to cross-examine Corporal Bartoe regarding the narrative. Therefore, we find that the admission of the narrative portion of Corporal Bartoe's interview with Appellant does not warrant reversal.[10]

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[9] We recognize that reports made in anticipation of litigation do not fall within the ambit of the business records exception because of their lack of trustworthiness. In the case *sub judice*, "the preparation of the police report appears to have been routine, rather than purposefully prepared for the sole purpose of litigation." ***See Commonwealth v. May,*** 898 A.2d 559, 565 (Pa. 2006).

[10] This Court may affirm a decision of the trial court if there is any basis on the record to support the trial court's actions, even if we rely on a different basis. ***Commonwealth v. Allshouse,***

Appellant's third evidentiary claim regards the trial court's allowance into evidence of a prior consistent statement made by Brian Joseph through the testimony of Corporal Bartoe. Ordinarily, a party is barred from introducing a consistent statement of its own witness to bolster the credibility of that witness. However, a party may introduce a prior consistent statement under limited circumstances in order to rehabilitate a witness whose credibility has been challenged. Pa.R.E. 613(c) governs admission of prior consistent statements, and states:

> **Evidence of prior consistent statement of witness.**
> Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:
>
> (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or
>
> (2) having made a prior inconsistent statement, which the witness has denied or explained, and the

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985 A.2d 847 (Pa. 2009).

> consistent statement supports the witness' denial or explanation.

Pa.R.E. 613.[11] 11 An express or implied charge of fabrication, bias, improper influence or faulty memory need not be direct and can be, "inferred, or insinuated either by cross-examination, presentation of conflicting evidence, or a combination of the two." ***Commonwealth v. Baker,*** 963 A.2d 495, 504 (Pa.Super. 2008).

The trial court herein found that Appellant expressly or impliedly charged Mr. Joseph with fabrication, bias, or improper influence. The Commonwealth, however, rightly points out that Appellant challenged the memory of Mr. Joseph. Specifically, Appellant questioned Mr. Joseph about his recollection of the direction in which Appellant's vehicle was parked, whether Mr. Joseph spoke over the vehicle he was riding in, and where Appellant's vehicle was located.

Appellant, however, asserts that because the Commonwealth introduced Mr. Joseph's prior consistent statement through Corporal Bartoe, it subverted Appellant's ability to cross-examine Mr. Joseph about the prior consistent statement.

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[11] A prior consistent statement is not introduced for the truth of the matter asserted and cannot be utilized as substantive evidence, but is introduced solely as rehabilitation evidence. ***See*** Comment to Pa.R.E. 613(c). Appellant did not, however, request a cautionary instruction and the trial court did not instruct the jury in that respect.

According to Appellant, the proper method of introducing the prior consistent statement required the Commonwealth to introduce the statement during re-direct examination of Mr. Joseph. We agree that the most appropriate procedure would have been to introduce Mr. Joseph's prior consistent statement via Mr. Joseph, who made the prior statement. This procedure is clearly implicated by the language of Pa.R.E. 613, which requires that a party be provided an opportunity to cross-examine the witness who made the prior statement. Nonetheless, our Supreme Court has permitted a separate witness to introduce a prior consistent statement of a witness who testified earlier in the proceedings. ***See Commonwealth v. Counterman,*** 719 A.2d 284, 301 (Pa. 1998). In ***Counterman, supra,*** the prosecution introduced a prior consistent statement of the defendant's wife, through the testimony of a police officer, after the defendant's wife testified. The Court held that the introduction of the prior consistent statement was proper because the defendant's wife's credibility was attacked and "she was extensively cross-examined as to her prior statements." ***Id.***

In ***Baker, supra,*** the trial court permitted the Commonwealth to play a DVD of an interview, which was conducted by a forensic pediatrician, of the child victim therein, to rebut a charge of fabrication. The forensic pediatrician took the stand to lay a foundation for the DVD and the prosecution thereafter played the interview. ***See Baker, supra*** at 502-505. Although this Court did not address the issue of the defendant's ability to cross-examine the

child, as the child was no longer on the stand, we determined that the trial court's admission of the DVD was proper pursuant to Pa.R.E. 613(c).

Similarly, in ***Commonwealth v. Hunzer,*** 868 A.2d 498 (Pa.Super. 2005), this Court, in determining the admission of a prior consistent statement pursuant to Pa.R.E. 613(c), decided that a prior consistent statement of a child victim was properly admitted through the testimony of a children and youth services caseworker. While neither ***Hunzer*** nor ***Baker, supra,*** specifically addressed the defendant's ability to cross-examine the witness who made the prior statement, each decision specifically noted that the defendants had extensively cross-examined those witnesses about prior statements before the introduction of their prior consistent statements. Instantly, Appellant cross-examined Mr. Joseph about the information he provided to Corporal Bartoe. Therefore, though we do not condone the exact method in which the Commonwealth introduced Mr. Joseph's prior consistent statement, as he was no longer on the stand and not subject to cross-examination at that time,[12] in light of ***Counterman, supra,*** and its

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[12] We believe that the language of Pa.R.E. 613(c), which provides, "Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement," when properly construed, means that the party must be permitted to cross-examine the witness who made the prior statement.

progeny, we conclude that the trial court did not err in permitting Corporal Bartoe's testimony.

In addition, Appellant posits that the trial court erred in qualifying Dr. Cannon as an expert in the field of accident reconstruction. Expert testimony is governed by Pa.R.E. 702, which provides:

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the
>
> evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in form of an opinion or otherwise.

Pa.R.E. 702. The standard for qualifying an expert is, "whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. Such knowledge need not be obtained through formal education but may have been acquired by other training or experience." ***Commonwealth v. Saunders,*** 946 A.2d 776, 785 (Pa.Super. 2008). Furthermore, "the witness's expertise may be based on practical, occupational, or other experiential training; it need not have been gained through academic training alone." ***Commonwealth v. Doyen,*** 848 A.2d 1007, 1014 (Pa.Super. 2004).

In the case *sub judice*, Dr. Cannon related that he received a master's degree in nuclear engineering from the University of Virginia, and a Ph.D. in physics from the University of Illinois at Urbana-Champagne. Dr. Cannon testified that he was a professor of physics since 1989, a certified accident reconstructionist, and was the primary accident reconstructionist in approximately fifteen auto collision cases. He further remarked that he had published two articles on accident reconstruction, four articles on nuclear engineering, and six publications on physics. Furthermore, Dr. Cannon was previously admitted as an expert witness in accident reconstruction in both Pennsylvania and Louisiana, testifying as an expert approximately six times.

Appellant's principal argument is that Dr. Cannon "only testified six (6) times in ten (10) years, and only once in the Commonwealth of Pennsylvania" as an accident reconstruction expert, and had "only completed fifteen (15) accident reconstructions within that ten (10) year period." Appellant's brief at 52. The limited number of times a person has testified as an expert, however, does not disqualify him as an expert. ***See Commonwealth v. Begley,*** 780 A.2d 605, 640 (Pa. 2001). Rather, it would go to the weight of his testimony and not to its admissibility. In light of Dr. Cannon's education, experience in the field of accident reconstruction, and his training as a certified accident reconstructionist, we find no error in the trial court's decision to find him qualified.

Appellant's remaining issue with respect to the trial court's evidentiary rulings is that the trial court erred in limiting the scope of defense counsel's direct examination of Christine Blain.[13] During Ms. Blain's direct examination, Appellant inquired into whether she had a conversation about how Appellant was getting home or if she informed him that hotel rooms were available for him to stay. The Commonwealth lodged a hearsay objection, which the trial court sustained.

Appellant asserts that he had previously testified about a discussion he had with Ms. Blain with respect to an offer to stay at a local hotel that night, thus, opening the door for the answer. Additionally, Appellant contends his statement to Ms. Blain that Mr. Bernardini was driving him home, was not hearsay and was admissible as a prior consistent statement.

Despite Appellant's contention to the contrary, the evidence undoubtedly was being offered for the truth of the matter asserted, namely, that Appellant was not driving that night. Hence, the testimony would have been hearsay. The issue, therefore, becomes whether the Commonwealth opened the door to the objectionable testimony, thereby permitting defense counsel to probe into that area.

The Commonwealth's question that Appellant alleges opened the door is as follows: "And is it not

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[13] Ms. Blain worked for the Washington Wild Things and was at the party Appellant attended that night.

true that someone from the Wild Things staff told you about the existence of a hotel room that you could use near to the Rhythm House that night?" N.T., 11/19/2008, Volume III, at 709. Appellant answered affirmatively to the question, but did not testify as to the substance of his conversation with Ms. Blain. Indeed, Appellant never testified that he informed Ms. Blain that Mr. Bernardini would be driving Appellant home that evening. Since Appellant did not testify as to the substance of any conversation that occurred between him and Ms. Blain, we conclude that the trial court properly sustained the Commonwealth's objection.

The final argument leveled by Appellant is that the trial court erred in imposing a sentence in the aggravated range of the sentencing guidelines by improperly considering factors already taken into consideration in the offense gravity score of the crimes for which he was convicted. Our standard of review in sentencing matters is well-settled. Sentencing is a matter vested within the discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. ***Commonwealth v. Johnson,*** *967* A.2d 1001 (Pa.Super. 2009). An abuse of discretion requires the trial court to have acted with manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous. ***Commonwealth v. Walls,*** 926 A.2d 957 (Pa. 2007).

Appellant's issue contests the discretionary aspects of his sentence. We note that there is no absolute right to appeal when challenging the

discretionary aspect of a sentence. ***Commonwealth v. Ahmad,*** 961 A.2d 884, 886 (Pa.Super. 2008). When a challenge to the discretionary aspect of a sentence is raised, an appellant must provide a separate statement specifying where the sentence falls in the sentencing guidelines, what provision of the sentencing code has been violated, what fundamental norm the sentence violates, and the manner in which it violates the norm. Pa.R.A.P. 2119(f).

An appeal is permitted only after this Court determines that there is a substantial question that the sentence was not appropriate under the sentencing code. ***Ahmad, supra*** at 886. A substantial question is raised when the appellant sets forth a plausible argument that the sentence violates a provision of the sentencing code or is contrary to the fundamental norms of the sentencing process. ***Id.*** In the instant case, Appellant has failed to provide a separate statement pursuant to Pa.R.A.P. 2119(f); however, the Commonwealth has not objected to the omission. ***See Commonwealth v. Stewart,*** 867 A.2d 589 (Pa.Super. 2005) (discussing that this Court may ignore omission if appellee failed to object). Therefore, we address Appellant's sentencing issue on its merits.

A contention that the sentencing court erred in imposing a sentence in the aggravated range by relying on impermissible factors raises a substantial question. ***Commonwealth v. Crork,*** 966 A.2d 585, 590 (Pa.Super. 2009). Appellant asserts that the trial court sentenced him in the aggravated range based

on factors already accounted for by the sentencing guidelines. Specifically, Appellant's consumption of alcohol, operation of a vehicle after consuming alcohol, and causing the death of an individual through his operation of a vehicle. According to Appellant, because these factors are elements of the crimes for which he was *convicted,* the trial court improperly aggravated his sentence. As we *have* previously held, "it is impermissible for a court to consider factors already included within the sentencing guidelines as the sole reason for increasing or decreasing a sentence to the aggravated or mitigated range." ***Commonwealth v. Simpson,*** 829 A.2d 334, 339 (Pa.Super. 2003).

Instantly, the trial court stated that the aggravating factors it considered were: (1) Appellant was drinking for an extended period of time on December 1, 2005; (2) a hotel room was available for Appellant to stay overnight but he refused; (3) Appellant chose to drive from Bridgeville to Auggie's to continue consuming alcohol; (4) Appellant *drove* from Auggie's after it closed and, after imbibing alcohol and caused a fatal car accident; and (5) Appellant remained steadfast that he was not the driver of the truck when the accident happened that night.

While the trial court utilized factors in aggravating the sentence that were already considered when determining the standard range for Homicide by vehicle and DUI, these reasons were not the sole reasons considered by the court in sentencing within the aggravated range. Further,

consuming alcohol is not part of the sentencing guideline considerations for determining the standard range of homicide by vehicle and causing a death is not factored into the sentencing guideline ranges for the crime of DUI.[14] Thus, we conclude that the trial court did not err in sentencing Appellant within the aggravated range of the sentencing guidelines.

Judgment of sentence affirmed.

Judgment Entered:

/s/ Eleanor R. Valecko
Deputy Prothonotary

DATE: JUNE 16, 2010

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[14] In contrast, a conviction of homicide by vehicle while DUI would implicate these considerations within the guideline ranges.

IN THE COURT OF COMMON PLEAS OF
WASHINGTON COUNTY,
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

ROY M. JACOBS, II

No. CR-2060-2007

APPEARANCES:

Michael J. Lucas, Esquire
Assistant District Attorney
Representing the Commonwealth

Ian N. Friedman, Esquire
Representing the Defendant

Moschetta Bell, J.
August 19, 2009

OPINION

This is an appeal from the Order of Sentence entered in the Court of Common Pleas of Washington County on February 11,2009 following a jury trial November 17-21,2008, wherein the defendant, Roy Jacobs, II, was convicted of one count of Homicide by Vehicle, a felony of the 3rd degree, section 3732, (as to victim Richard Morris) and one count of Driving

Under the Influence of Alcohol or Controlled Substances, an ungraded misdemeanor, first offense, second tier, section 3802(b). The defendant was also found guilty by the court of one summary count of Reckless Driving, section 3736, one count of Driving on Divided Highways, a summary at section 3311, one summary count of Driving Vehicle at Safe Speed, and one count of summary Careless Driving. Defendant was found not guilty by the jury of two (2) counts of Homicide by Vehicle While Driving Under the Influence; and one (1) count of Homicide by Vehicle (as to victim Bernardini who was the passenger in Defendant's vehicle).

After the jury trial, Defendant hired new counsel, Ian Freedman and Associates, from the state of Ohio. Attorney Freedman and his associate, Eric Nemecek, were admitted to the court *pro hac vice* with the support of local counsel, Erin Dickerson, on February 11, 2009. Counsel then proceeded to represent the defendant from the date of the sentencing hearing forward.

On February 11, 2009, the court sentenced the defendant. The defendant received no less than two (2) to no more than four and one half (4 1/2) years at a state correctional facility for Homicide by Vehicle. For Driving Under the Influence, the defendant was sentenced to three (3) to six (6) months consecutive to the Homicide by Vehicle. The defendant's aggregate sentence at a state penal institute was no less than two (2) years and three (3) months and no more than five (5) years. The court also sentenced the defendant to pay costs and fines on the four (4) summary

convictions.

Following sentencing, the defendant filed:

1. Post-Sentence Motions; and,
2. Motion to Compel Production of Pre-Sentence Interview Recordings.

Both motions were denied by the court. Defense counsel then filed the instant appeal on April 13, 2009.

In his Notice of Appeal, Defendant raises the following issues pursuant to Rule 1925(b) of the Rules of Appellate Procedure:

1. The verdict is not sustained by sufficient evidence because, even when viewing all of the evidence admitted at trial in the light most favorable to the Commonwealth, there is insufficient evidence to enable the fact-finder to find each and every element of the crimes beyond a reasonable doubt;
2. The verdict in the case at bar is against the weight of the evidence presented at trial;
3. The verdicts rendered in this matter are inconsistent and cannot stand;
4. Abuse of discretion in various evidentiary rulings including, but not limited to the following:
    a. Failing or refusing to grant Appellant's Motion for Judgment of Acquittal during trial;
    b. Failing or refusing to allow defense counsel to introduce

and/or utilize a computer generated reconstruction of the accident;

c. Imposing a sentence in the aggravated range, as well as considering certain facts and circumstances as "aggravating" when said facts and circumstances were already accounted for in the statutory elements of the offense(s) or penalties;

d. Denying Appellant's Post-Sentence Motion;

e. Sustaining the Commonwealth's objection to the permissible cross-examination of Coroner Warco (Tr. at 247-249);

f. Permitting the Commonwealth to have its witness read a narrative statement into the record over defense counsel's objection (Tr. at 541-543);

g. Permitting the Commonwealth's experts to render conclusory opinions, thereby improperly invading the province of the jury;

h. Permitting the Commonwealth to introduce the prior consistent statement of a previous witness, Brian Joseph, by and through a subsequent witness and over defense counsel's objection (Tr. at

549);

i. Allowing Dr. Cannon to testify as an expert in the field of accident reconstruction without proper qualification and/or certification and over defense counsel's objection (Tr. at 575-577);

j. Refusing to allow questioning of Christine Blain as to relevant statements made and attested to by Appellant at trial (Tr. at 779); and

k. Refusing to declare a mistrial where there was clear evidence of juror misconduct including, but not limited to a juror's bringing literature on airbags to court during the deliberation phase of the proceedings, as well as the jury's awareness of the severity of the penalities which could be imposed in the matter.

5. Ineffective assistance of trial counsel in the following respects:

a. Failing to properly and/or adequately cross-examine the Commonwealth witnesses and experts;

b. Permitting the jury to continue deliberations with only eleven (II) jurors;

c. Failing to demand a mistrial in spite of clear evidence of juror

misconduct;
d. Inadequate preparation, including pertinent pretrial motion practice and thorough investigation.

Procedural History

On October 10, 2007, Defendant was charged with two counts of Homicide by Vehicle While Driving Under the Influence (75 P.S. §3735§§A), two counts of Aggravated Assault by Vehicle While Driving Under the Influence (75 P .S. §3735.1 §§A), two counts of Homicide by Vehicle (75 P.S. §3732§§A), one count of Driving Under the Influence, General Impairment (75 P.S. §3802§§Al), one count of Driving Under the Influence (75 P.S. §3802§§B), one count of Reckless Driving (75 P.S. §3736§§A), one count of Driving on Divided Highways (75 P.S. §3311 §§A), one count of Driving Vehicle at Safe Speed (75 P.S. §3361), and one count of Careless Driving (75 P.S. §3714§§A) and a count of Careless Driving - Unintentional Death (75 P.S. §3714§§B). On October 24, 2007, all charges were held for court at the preliminary hearing. The Commonwealth withdrew the two (2) counts of Aggravated Assault by Vehicle While Driving Under the Influence prior to trial.

At trial, the Commonwealth presented the testimony of twelve (12) witnesses: Paramedic Peter Allen Error, State Trooper Frank Konek, State Trooper Richard Hunter, Hannah Louise Baum, Patricia Shannon Terrell, Brian Robert Joseph, State Trooper Robert Leibhart, Coroner S. Timothy Warco,

Forensic Pathologic Leon Rozin, Forensic Scientist Michelle Barch, Toxicologist Frederick Fochtman, Corporal Douglas Bartoe, Accident Reconstructionist Joel. W. Cannon, and Pathologist Karl Williams. For the defense, the defendant, Roy Jacobs, II, testified on his own behalf. The defense also presented the testimony of Dr. Karl E. Williams, Engineer Daniel Aerni, John Massarelli, Christine Blain, Amanda Snoke, Sara Henderson, Samantha Lemley, Barbara Easlick, and Robin Mingo-Miles.

Based upon the testimony of the witnesses provided at trial, the facts of the case were presented as follows: Roy Jacobs, Defendant, was a former first base coach for Washington County's baseball team, the Wild Things. On December 1, 2005, at approximately 9:30 p.m., the defendant visited the home of Robert Bernardini and his family. Mr. Jacobs had previously lived with the Bernardinis as they were a host family for staff of the Wild Things who lived outside of town. While at the house, the defendant asked Mr. Bernardini to accompany him to the Wild Things' Christmas party which was taking place at the Rhythm House in Bridgeville. The defendant then drove his blue Ford Ranger pickup truck to the Rhythm House. After getting a ride from Ms. Patricia Shannon Terrell, Mr. Bernardini eventually met him there. While at the Christmas party, the defendant drank alcohol and appeared to be intoxicated.

Around 11 :00 o'clock p.m., the defendant, Mr. Bernardini, and Ms. Terrell decided to go to Auggie's, a bar on Route 19 in Washington County. The

defendant drove his Ford Ranger. Mr. Bernardini and Ms. Terrell followed in another vehicle. Once at Auggie's, the defendant continued to imbibe alcohol. Again, he appeared to be intoxicated, as he was slumped over with his head on the bar. While at the establishment, Mr. Bernardini introduced the defendant to Mr. Brian Joseph. When the bar closed on December 2, 2005 at approximately 2:00 a.m., Mr. Joseph and a friend walked out of the establishment behind the defendant and Mr. Bernardini. Mr. Joseph witnessed the defendant, who at the time was wearing a large cowboy hat, get into the driver's side of the Ford Ranger. Mr. Bernardini got into the passenger's side. As the defendant's Ford Ranger left Auggie, Mr. Joseph and another passenger then drove behind it for several miles. At one point, Mr. Joseph witnessed the Ford Ranger hit a lane divider and skip the curb while making a right turn onto Race Track Road. Mr. Joseph's vehicle continued to follow behind Mr. Jacobs down Route 19 towards Interstate 79. Just as the defendant's Ford Pickup began to turn onto Interstate 79, Mr. Joseph's vehicle turned into a McDonald's parking lot. Mr. Joseph testified that at no point in time did he see the defendant's vehicle stop or pull over before turning onto Interstate 79. Furthermore, Mr. Joseph testified he recognized the defendant as the driver of the Ranger while it was driving from Auggie's and onto Interstate 79 by the large cowboy hat the defendant continued to wear while driving and the size difference of the two (2) men.

Once the defendant was on Interstate 79, he proceeded to drive south onto Interstate 70

westbound. As the defendant drove the Ford Ranger near the Chestnut Street exit, he lost control of the vehicle. The pickup proceeded to cross from the southern lane, across a grassy median, and into the northern lane where it collided with a Cadillac. The pickup then began to spin and the passenger side door swung open. Both Mr. Bernardini and Mr. Jacobs were ejected from the vehicle as it spun. Mr. Bernardini was instantly killed when he was projected head first into a guardrail. The driver of the Cadillac, Mr. Richard Morris, was also killed when the defendant's pickup smashed the front end of the car, pinning the victim inside. The defendant was found lying on the road surface by EMT Peter Allen Error. Mr. Error detected the odor of alcohol coming from the defendant. Mr. Jacobs was then sent by medical helicopter to a trauma center. It was determined that the defendant's blood alcohol level (BAC) at the time of the accident was .14%.

Legal Analysis

A. Sufficiency of the Evidence

In the Concise Statements of Matters Complained of on Appeal, the defendant argues there was insufficient evidence presented at trial to meet each element of the convictions beyond a reasonable doubt. The standard of review for a claim of sufficiency requires the court to evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." *Commonwealth* v. *Widmer,* 744 A.2d 745, 751

(Pa.2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty," and may sustain its burden by means of wholly circumstantial evidence. Significantly, "[the court] may not substitute [its] judgment for that of the factfinder; if the record contains support for the convictions they may not be disturbed." *Commonwealth* v. *Brewer,* 876 A.2d 1029, 1032 (Pa. Super. 2005).

According to this standard, the sufficiency of the evidence presented at trial was adequate to support a guilty verdict against the defendant. When viewing the evidence in the light most favorable to the verdict winner (the Commonwealth), the evidence establishes each material element of the crimes charged and the commission thereof by Mr. Jacobs, beyond a reasonable doubt.

As previously stated, Mr. Jacobs was convicted of one count of Homicide by Vehicle, a felony of the 3rd degree, section 3732, one count of Driving Under the Influence of Alcohol or Controlled Substances, an ungraded misdemeanor, first offense, second tier, section 3802(b), one summary count of Reckless Driving, section 3736, one count of Driving on Divided Highways, a summary at section 3311, one summary count of Driving Vehicle at Safe Speed, and one count of guilty on the summary offense of Careless Driving.

In order for a defendant to be found guilty of Homicide by Vehicle, the following elements must be met:

1. The defendant must have committed an underlying violation of the Motor Vehicle Code;
2. The defendant acted recklessly or with gross negligence by driving in a manner that violated a section of the Motor Vehicle Code;
3. That the victim is dead; and
4. That the defendant's violation of the Motor Vehicle Code was the direct cause of death.

In this case, the evidence presented at trial established that the defendant consciously disregarded a substantial and unjustifiable risk, or acted recklessly, when he violated the Pennsylvania Motor Vehicle Code by Driving Under the Influence of Alcohol, section 3802(b). This directly resulted in the death of Richard Morris as the defendant lost control of the Ford Ranger pickup as a result of driving under the influence. (T.T., Vol. II, pg. 450).

For a defendant to be found guilty of Driving Under the Influence of Alcohol or a Controlled Substance, the following elements must be met:

1. The defendant imbibed alcohol;
2. The defendant then drove, operated, or was in actual physical control of the movement of a vehicle upon a highway or trafficway; and
3. That within two hours after driving, operation, or actual physical control, the

> alcohol concentration in the defendant's blood or breath was from .10% to .159%.

Here, the jury determined that the defendant drank alcohol at both the Rhythm House and Auggie's Bar. The defendant then drove within two hours of imbibing alcohol and was in physical control of his vehicle. This was established through the testimony of Brian Joseph who stated he witnessed the defendant imbibe alcohol throughout the night at Auggie'. (T.T., Vol. II, pgs. 182-184). At approximately 2:00 o'clock a.m., Mr. Joseph observed the defendant get into the driver's side of the Ford Ranger pickup and drive the vehicle onto the interstate. (T.T., Vol. II, pg. 185). Finally, the defendant's blood alcohol content was .14%, .06% over the legal limit. (T.T., Vol. II, pg. 363).

B. Weight of the Evidence

In the defense's Concise Statement of Basis for Appeal, Defendant alleges the weight of the evidence presented at trial was insufficient to sustain a conviction. In *Commonwealth* v. *Taylor,* 471 A.2d 1228, 1230 (Pa.Super. 1984), the court stated:

> Whether a new trial should be granted on grounds that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial judge, and his decision will not be reversed on appeal unless there has been an abuse of discretion .... The test is not whether the court would have decided the case in the same way but whether the verdict is so contrary to the evidence as to make the award

> of a new trial imperative so that right may be given another opportunity to prevail.

This holding was affirmed in *Commonwealth v Whiteman,* 485 A.2d 459 (Pa.Super. 1984) and *Commonwealth v. Murray,* 597 A.2d. 111 (Pa.Super. 1991).

In the present case, the evidence offered to support a verdict of guilt was not "so unreliable and/or contradictory as to make any verdict based thereon pure conjecture." *Commonwealth v. Jenkins,* 578 A.2d 960, 962 (Pa. Super. 1990) quoting *Commonwealth v. Bennett,* 303 A.2d 220 (Pa.Super. 1973). The evidence of the case, specifically the testimony of Mr. Joseph, establishes that the defendant was driving his vehicle after imbibing alcohol at the Rhythm House and Auggie's. The evidence further proves that the defendant's reckless driving while under the influence of alcohol resulted in a car accident that directly led to the death of Richard Morris. This was testified to by numerous witnesses for the Commonwealth, specifically Corporal Douglas Bartoe. Based upon the testimony, the verdict of guilty is upheld by the facts entered into evidence at trial. The evidence is not unreliable or based upon pure conjecture. Furthermore, the verdict is not so contrary to the evidence to make the award of a new trial imperative. The weight of the testimony supports the jury's finding of guilty to Homicide by Vehicle (Richard Morris) and Driving Under the Influence.

C. The Verdicts are Inconsistent

The defense alleges in the Concise Statement of Matters Complained of on Appeal that the "verdicts rendered in this matter are inconsistent and cannot stand." Pennsylvania law, as well as federal law, has long held that consistent verdicts in criminal cases are not necessary. *Dunn* v. *United States,* 52 S.Ct. 189 (US 1932); *Com* v. *Parrotta,* 150 A.2d 396 (Pa.Super. 1959). While inconsistent verdict are often perplexing, they are not considered mistakes and do not constitute a basis for reversal. *Com.* v. *Petteway,* 847 A.2d 713 (Pa.Super. 2004). Thus, the verdicts rendered against the defendant, Mr. Jacobs, stand.

D. Abuse of Discretion

In the Concise Statement of Matters Complained of on Appeal, the defense argues "abuse of discretion in various evidentiary rulings including, but not limited to..." and then provides a list of eleven areas the defense believes the trial court erred. Each of these arguments will be handled separately in the section below. It should be noted however, that while the defense states "including, **but not limited to,**" any issues not specifically raised at this point with the trial court are deemed waived. Pennsylvania Rule of Appellate Procedure 302(a).

1. Motion for Judgment of Acquittal

The defense argues the trial court abused its discretion by failing or refusing to grant the Motion for Judgment of Acquittal during trial. The Concise Statement of Appeal does not make it clear whether the defense is challenging the motion at the close of the Commonwealth's case-in-chief, the close of all the evidence, or both. Because the defense states "during trial," it is assumed they are limiting themselves to those two timing of the motions and not any other times motions for acquittal may be presented before the court as stated in Rule 606 of the Pennsylvania Rules of Criminal Procedure.

According to Pa.R.Crim.Pro 606, a Motion for Judgment of Acquittal is used to challenge the sufficiency of evidence presented at trial. As previously stated, when viewing the evidence in the light most favorable to the verdict winner, the verdict was sustained by sufficient evidence. Thus, this argument is moot.

2. Failure to Introduce a Computer-Generated Reconstruction

In the Concise Statement of Matters Complained of on Appeal, the defense asserts the trial court abused its discretion by "failing or refusing to allow defense counsel to introduce and/or utilize a computer-generated reconstruction of the accident."

During their case-in-chief, the defense introduced the testimony of Daniel Aemi, a

consulting engineer specializing in analyzing motor vehicles and motor vehicle accidents. Following the expert qualification of Mr. Aemi by the defense, the Commonwealth asked to approach the bench. At that point, the following discussion took place between the Commonwealth, defense counsel and the court:

> THE COURT: Is this regarding the expert designation?
>
> MR. LUCAS: Not regarding that, regarding what is next on the list. Are you intending to have this jury view the simulation from EDSMAC.
>
> MR. DERISO: What?
>
> MR. LUCAS: The simulation from EDSMAC.
>
> MR. DERISO: I don't have it. He relied on that. It's not one of my diagrams. Those diagrams we discussed - - I do intend on having him explain the simulation, show them what it does and show where the impact would have been on the cars per the simulation.
>
> MR. LUCAS: Because if we are going to use the simulation - - I thought you were using the diagrams as demonstrative evidence, but you would not be playing the simulation for the jury?
>
> MR. DERISO: I'm not playing the simulation, no. What I have is a piece of paper, and I can show it to you, which shows all the spaces of simulation and then the simulation where the damage to each vehicle would have been.
>
> MR. LUCAS: I'm going to ask that there be no reference to the fact it is a simulation, that these are just diagrams he has prepared in the course of his work, because simulations

> require a heavy evidentiary burden and typically are not admissible. However, as a piece of demonstrative evidence, if you want to refer to sections of the diagram --
> MR. DERISO: There is no simulation, but I intend on asking his opinion derived in part as to that simulation, but the jury will not see a movie or video style simulation.
> MR. LUCAS: Right. Because there has to be foundation to say it's consistent with all the facts.
> THE COURT: He intends on making reference to the simulation?
> MR. DERISO: As a demonstrative aid in helping to form his opinion.

(T.T. vol. III, pgs. 720-722).

As is evident by the transcript, the trial court never "failed or refused to allow" defense counsel to introduce and/or utilize a computer-generated reconstruction of the accident. Defense counsel chose not to show the jury any video simulation of the crash. Rule 302(a) of the Pennsylvania Rules of Appellate Procedure states, "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." As the defendant failed to raise this issue during the trial, it is deemed waived for appeal.

3. Imposing a Sentence in the Aggravated

Range

The defendant also argues that the court abused its discretion by "imposing a sentence in the aggravated range, as well as considering certain facts and circumstances as "aggravating" when said facts and circumstances were already accounted for in the statutory elements of the offense(s) or penalties.

According to *Commonwealth v. Fulllin,* 892 A.2d 843, 847 (Pa.Super. 2006),

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

When sentencing a defendant, the court must consider the protection of the public, gravity of the offense in relation to impact on victim and community, and rehabilitative needs of the defendant. ... *Commonwealth v. Shugars,* 895 A.2d 1270 (Pa.Super.2006) *quoting* 42 Pa.Cons.Stat.Ann. §9721(b). In addition, "a trial court judge has wide discretion in sentencing and can, on the appropriate record and for the appropriate reasons, consider any legal factor in imposing a sentence in the aggravated range. *Com v. Shugars,* 895 A.2d 1270, 1275

(Pa.Super.2006) quoting *Commonwealth v. Stewart, 867* A.2d 589, 593 (Pa.Super. 2005). However, the sentencing court must also consider the sentencing guidelines. *Fullin,* 892 A.2d at 847.

In the present case, the defendant had a prior record score of a zero. The offense gravity score for a Homicide by Vehicle §3732 when there is also a conviction for DUI arising from the same incident is an eight (8). See Pennsylvania Sentencing Guidelines §303.15. Therefore, the standard range is nine (9) to sixteen (16) months and the aggravated range is eighteen (18) to twenty-five (25) months. The Court imposed the sentence of two (2) years or twenty-four (24) months to four and a half (4 ½) years – an aggravated range sentence. As to the Driving Under the Influence conviction, defendant's prior record score was a zero and the offense gravity score was a one with the standard range being restorative sanctions and the aggravated range being restorative sanctions to three (3) months. The Court sentenced in the aggravated range consecutive to the Homicide by Vehicle with a sentence of three (3) to six (6) months. Defendant's aggregated sentence, then, was two (2) years, three (3) months to five (5) years. The sentence was within the Pennsylvania Sentencing Guidelines albeit in the aggravated range which the Court believed appropriate under these facts and circumstances. There has been no abuse of discretion here.

4. Denying appellant's post-sentence

motion.

On February 23, 2009, defense counsel filed a post-sentence motion. In the motion, counsel moved pursuant to Rule 720 of the Pennsylvania Rules of Criminal Procedure and requested a new trial. Based upon that motion, the trial court ordered a hearing for argument on the post-sentence motion on March 30th, 2009.

At the hearing, defense counsel argued there were three issues which required a new trial: 1. The verdict was against the weight of the evidence in that the Commonwealth presented inconsistent theories and testimony in support of its contention that Defendant Jacobs was the driver of the 2002 Ford truck; 2. the verdicts are inconsistent and cannot be reconciled; and 3. the court's imposition of a sentence in the aggravated range and outside the standard range of the Pennsylvania Sentencing Guidelines was improper.

Each of these issues was previous discussed. For a more detailed, in depth discussion, please see above. However, the trial court did not err in denying appellant's post-sentence motions. First, the jury's verdict was well supported by the weight of the evidence and the facts presented by the Commonwealth. In addition, all Commonwealth experts opined that the defendant was the driver of the Ford truck. Second, it is axiomatic that inconsistent verdicts are not sufficient grounds for setting aside a verdict in the Commonwealth. Finally, the court justified sentencing the defendant

in the aggravated range rather than the standard range on the record on the date of sentencing.

5. Sustaining the Commonwealth's objection to the permissible cross-examination of Coroner Warco

During the trial, the Commonwealth objected to the cross-examination of Coroner Warco as being beyond the scope of direct and attempting to eliciting impermissible hearsay. The defense argues that the trial court abused its discretion when it sustained the Commowealth's objection to the cross-examination of Coroner Warco.

The scope of cross-examination is within the sound discretion of the trial court. *Commonwealth* v. *Shriner,* 332 A.2d 501 CPa. Super. 1974). Cross-examination questions which appear irrelevant, collateral or beyond the scope of cross examination are ordinarily excluded. *Commonwealth* v. *Cheatam,* 239 A.2d 293 CPa. 1968); *Commonwealth* v. *Green,* 434 A.2d 137 CPa. Super. 1981). Even if the Court's ruling on the scope of cross-examination is erroneous, the error cannot justify reversal unless it results in palpable injury. *Commonwealth* v. *Donnelly,* 336 A.2d 632 CPa. Super. 1975). Errors which are harmless beyond a reasonable doubt do not necessitate reversal. *Commonwealth* v. *Story,* 383 A.2d 155 CPa. 1978).

In the present case, the defense asked Coroner Warco the following questions on cross examination:

QUESTION: Cause and manner is blunt

force trauma as a result of the accident or, you know, a shooting, the manner is homicide, correct, cause and manner?
ANSWER: There are two distinct different categories. Causation is why someone died. The manner of death, there is five categories, homicide, suicide, natural, cannot be determined, and pending investigation.
QUESTION: Is it within your office's purview to make a call as to who was driving and who was the passenger of a vehicle?
ANSWER: Yes.
QUESTION: The coroner makes that call?
ANSWER: Yes.
QUESTION: Was it done in this case, do you know?
ANSWER: Yes.
QUESTION: Who made the call, you or Dr. Rozin? He did the autopsy.
ANSWER: My information was gathered at the scene with the investigating police officers. I later conferred with Bartoe.
QUESTION: So that night you consulted as to who was the driver?
ANSWER: That morning.
QUESTION: That morning?
ANSWER: Yes.
QUESTION: So on December 2, 2005, you had a conversation with Corporal Bartoe that Roy Jacobs was the driver?

ANSWER: Somewhere along between the time that I arrived at the accident and autopsy time, yes.
QUESTION: The autopsy ofMr. Bernardini was 6 a.m. on December 2. Dr. Rozin did the autopsy; correct?
ANSWER: I'm not certain that's factual unless I look at my time frame.
QUESTION: Do you have it?
ANSWER: Yes.
QUESTION: Please look at it.
ANSWER: May I?
THE COURT: Yes.

(T.T. Vol., 1, pgs. 243 - 245). At that point, the Commonwealth asked to approach and objected based upon the cross-examination being outside the scope of cross. (T.T. Vol. 1, pgs. 246). The trial court then properly sustained the objection. During direct examination, the Commonwealth did not seek an opinion of the cause and manner of death from Coroner Warco because it was based upon hearsay statements made by Dr. Leon Rozin and Corporal Douglas Bartoe. In fact, Coroner Warco was never qualified as an expert by the Commonwealth. In his cross-examination, the defense was attempting to obtain an opinion from Coroner Warco as to the identity of the driver of the pickup truck. This clearly is beyond the scope of direct as it is an opinion as to an ultimate issue, which can only be presented to a jury by an expert, according to Pa.R.E. 704. On the basis of the evidence then in the record, defense counsel's question appeared irrelevant, collateral and beyond the scope of direct examination by the district attorney.

Furthermore, even if the trial court had overruled the objection, the testimony was still unable to be admitted because it was based on hearsay, as the Commonwealth properly asserted at sidebar. Rule 802 of the Pennsylvania Rules of Evidence states that "hearsay is not admissible except as provided by the rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute." As hearsay evidence was being offered for the truth of the matter asserted, that being the identity of the driver of the pickup truck, it cannot be admitted and was correctly sustained by the trial court.

6. Permitting the Commonwealth to have its witness read a narrative statement into the record over defense counsel's objection

The defense alleges in the Concise Statement of Matters Complained of on Appeal that the trial court abused its discretion by overruling an objection to Corporal Bartoe reading a narrative section of his police report during redirect. However, this evidence was admissible to the jury as defense counsel had extensively questioned Corporal Bartoe regarding the context of the report on cross examination. (T. T. Vol. II, pgs. 452-457).

Pennsylvania law has long established that "where one party offers part of a conversation, the other is entitled to bring out the balance .... " *Commonwealth v. Nelson*, 144 A. 542, 543 (Pa. 1929).

In *Commonwealth* v. *Stakley,* the court stated: One who induces a trial court to let down the bars to a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary is also allowed to avail himself of that opening. The phrase 'opening the door' by cross examination involves a waiver. If defendant delves into what would be objectionable testimony on the part of the Commonwealth, then the Commonwealth can probe further into the objectionable area. 365 A.2d 1298, 1299-1300 (Pa.Super. 1976). *See also Commonwealth v. Patosky, 656* A.2d 499, 504 (Pa.Super. 1995) holding when defendant delves into what would have been objectionable testimony on Commonwealth's part, Commonwealth can probe into objectionable area); *Commonwealth v. Bey,* 439 A.2d 1175, 1178 (Pa.Super. 1982) (holding where defendant opens door to what otherwise might be objectionable testimony, Commonwealth may probe further to determine veracity of statement).

Instantly, during cross examination, the defense asked about the interview Corporal Bartoe conducted with the defendant on December 3, 2005. (T.T., Vol. II, pg. 453). Specifically, the defense even began the cross examination by telling Corporal Bartoe to reference his notes from the interview if necessary stating, "I am going to touch upon some basics, and this is almost three years ago, and what I want to do is give you an opportunity with some of the things you said, I think if you refresh you recollection with your notes, it may help you to recall. For instance, when you went in to see Mr. Jacobs on the 3rd, you came to see him at about 1:30 in the

afternoon?" (T.T., Vol. II, pgs. 452- 453). The defense then asks precise questions about statements made by the defendant during the December 3 interview. (T.T., Vol. II, pgs. 454-457).

> QUESTION: And during this period of time on the 3rd, shortly after surgery, being sedated with narcotics, he didn't mention to you that he was at Auggie's; correct?
> ANSWER: No.
> QUESTION: In fact, I believe he mentioned to you that he was at the Rhythm House?
> ANSWER: Yes.
> QUESTION: And given what you were able to piece together, Bob Bernardini did, in fact, come to the Rhythm House and meet him?
> ANSWER: Yes.
> QUESTION: They ended up going to Auggie's at some point; correct?
> ANSWER: I didn't get that from Mr. Jacobs.
> QUESTION: Through your investigation?
> ANSWER: Yes.
> QUESTION: And Ms. Terrell left leaving Bob with Mr. Jacobs?
> ANSWER: Yes.
> QUESTION: With those facts, his statement isn't so off the wall, we can agree under those circumstances? It's not inconsistent?

(T.T., Vol. II, pgs. 455-456). Based upon those

questions, and specifically the final question asking Corporal Bartoe if the statement presented by the defendant was "off the wall," the defense opened the door for the Commonwealth to have the narrative of the police report read to the jury.

7. Permitting the Commonwealth's experts to render conclusory opinions, thereby improperly invading the province of the jury.

The defense argues that the trial court abused its discretion when it permitted the Commonwealth's experts to render conclusory opinions. Pennsylvania Rule of Evidence 702 states, "If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." Furthermore, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Pa.R.E. 704. The Pennsylvania Rules of Evidence expressly permit an expert to render conclusory opinions even if they embrace an ultimate issue to be decided by the jury. These opinions do not improperly invade the province of the jury. Therefore, the trial court was correct in allowing the Commonwealth's experts to render conclusory opinions.

8. Permitting the Commonwealth to

introduce the prior consistent statement of a previous witness, Brian Joseph, by and through a subsequent witness and over defense counsel's objection

The defense argues in the Concise Statement of Matters Complained of on Appeal, that the trial court abused its discretion by allowing Corporal Bartoe to testify to a prior consistent statement made by Brian Joseph. However, the trial court was correct in admitting the statement in accordance Pa.R.E. 613(c) as the testimony of Mr. Joseph had previously been impeached by the defenses.

> Pennsylvania Rule of Evidence 613(c) states:
>
> (c) Evidence of Prior Consistent Statement of Witness
>
> Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:
>
> (1) fabrication, bias, improper influence or motive or faulty memory and the statement was made before that which has been charged existed or arose; or
>
> (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation.

During the cross-examination of Mr. Joseph, the defense impliedly charged Mr. Joseph with improper influence, bias or motive:

> QUESTION: Yes. Do you recall speaking to Corporal Bartoe on or about December 17, 2005?
> ANSWER: Yes, sir.
> QUESTION: How did that contact come to be?
> ANSWER: I can't remember on how I came to find out that there was an undetermined driver of the vehicle and I decided to give him a call to tell him what I saw.
> QUESTION: So you called Corporal Bartoe, that's your recollection?
> ANSWER: Yes, sir. Well, I called the State Police, not necessarily him. He gave me a call back.
> QUESTION: You left a message for Corporal Bartoe to get a hold of you?
> ANSWER: Sir, I don't know if I left it for him directly or just in general.
> QUESTION: You indicated to someone at the State Police?
> ANSWER: Yes. I indicated to someone at the State Police.
> QUESTION: You are indicated that as of - - the accident happened on the 2nd and your first interview was December 14th and a subsequent on one on the 17th. During that 12 - day period you had come to find out there was issue as to the identity of the driver?

> ANSWER: Yes, sir.
> QUESTION: Did that come from a friend or family of Mr. Bernardini?
> ANSWER: To tell you the truth, it could have been. It could have been the paper. I don't know.

(T.T., Vol. I, pgs. 199-200). By asking if the witness learned of the issue of the identity of the driver through a friend or family of Mr. Bernardini, the defense impliedly suggested that Mr. Joseph was biased or improperly influenced when he contacted the State Police to tell them the identity of the truck driver was Roy Jacobs.

Furthermore, by questioning Mr. Joseph about his conversation with Corporal Bartoe, the defense opened the door for the Commonwealth to question Corporal Bartoe on the subject.

9. Allowing Dr. Cannon to testify as an expert in the field of accident reconstruction without proper qualification and/or certification and over defense counsel's objection

In their Concise Statements of Matters Complained of on Appeal, the defense argues that the trial court erred in allowing Dr. Cannon to testify as an expert in the field of accident reconstruction without proper qualification and/or certification. In *Miller v. Brass Rail Tavern,* 664 A.2d 525, 528 (Pa. 1995), the Pennsylvania Supreme Court stated:

> The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable

> pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.

This determination of the qualification of an expert is a low threshold and is within the discretion of the trial court. *Barrackv. Kolea,* 651 A.2d 149 (Pa.Super. 1994).

In the present case, the trial court did not abuse its discretion in permitting Dr. Cannon to testify as an expert in the field of accident reconstruction. In the past ten (10) years, the witness has completed fifteen (15) accident reconstructions. He attends continuing education seminars and is professionally certified under the Accredited Traffic Accident Reconstruction (ACTAR) affiliation. Furthermore, the witness is a member of the American Physical Society and the Association of Accident Reconstruction Specialists. (T.T., Vol. III, pgs. 573-574). Finally, Dr. Cannon had testified six (6) times as an expert in the past nine (9) to ten (10) years. (T.T., Vol. III, pg. 572).

The defense argues that Dr. Cannon is not qualified to testify as an expert because he has only testified six (6) times in the past ten (10) years. However, the number of times that a witness has testified is not what qualifies them to be an expert. An expert may be qualified based upon a combination of training, experience, and education. Expert testimony is proper when it is offered by a witness with any "reasonable pretension to special knowledge on the subject under investigation."

Commonwealth v. *Stallworth*, 781 A.2d 110, 121 (Pa.2001). Therefore, as Dr. Cannon extensively testified on *voir dire* to his training, education, and experience, he was properly qualified as an expert in the field of accident reconstruction.

10. Refusing to allow questioning by Christine Blain as to relevant statements previously made and attested to by Appellant at trial.

During the trial, defense counsel asked Christine Blain, "Did you have any conversation about how he [defendant] was getting home or when you offered him that room?" (T.T. Vol. III, pg. 779). That question was objected to by the Commonwealth on the grounds of hearsay. Defense counsel rebutted, "The Defendant testified to what he told her. She is confirming it." (T.T. Vol. III, pg. 779). The court sustained the objection. (T.T. Vol. III, pg. 779).

The defendant now argues that the trial court abused its discretion when it sustained that hearsay objection by the Commonwealth regarding the defense questioning "Christine Blain as to relevant statements previously made and attested to by Appellant at trial." However, a review of the trial transcript, specifically the defendant's testimony, reveals that the defendant never previously testified about this conversation with Christine Blain. (T.T. Vol. III, pgs. 663 - 715). Therefore, the question posed to Ms. Blain at trial called for inadmissible hearsay.

According to Pa.R.E. 801(c), hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is not admissible at trial except as provided by the Pennsylvania Rules of Evidence. Pa.R.E. 802. In this case, the defense was attempting to introduce an out-of-court statement offered for the truth of the matter asserted through a witness, Christine Blain. The question regarding how the defendant was getting home that night was a central issue of the trial, that being whether the defendant was the driver of the vehicle when then accident occurred. Therefore, the answer Ms. Blain would have provided would be offered for its truth, thus making it inadmissible at trial.

11. Refusing to declare a mistrial where there was clear evidence of juror misconduct including, but not limited to a juror's bringing literature on airbags to court during the deliberation phase of the proceedings, as well as the jury's awareness of the severity of the penalties which could be imposed in the matter.

In the Concise Statement of Matters on Appeal, the defense argues the trial court was in error for "refusing to declare a mistrial" when a juror brought information regarding airbags to court. However, the trial court never "refused" to declare a mistrial as a motion for a mistrial was never raised by counsel.

On the second day of jury deliberations before deliberations began, a juror approached the court's law clerk and asked if he could take information regarding airbags into the deliberations and distribute it. (T.T. Vol. V., pg. 940). The law clerk took the materials from the juror and brought them to the attention of the judge. (T.T. Vol. V. pg. 940). In chambers, the trial judge then made counsel aware of what had occurred and provided them with the paperwork for review. (T.T. Vol. V., pgs. 939 - 940). After learning of this information as well as reviewing the paperwork, neither counsel made a motion for a mistrial. (T.T. Vol. V., pgs. 939 - 945). In fact, counsel stated:

> MR. DERISO: On behalf of defense, we acknowledge, we have read and reviewed the information provided to your clerk. Although we agree it should not go back with the jury, we would suggest a remedy would be to bring the juror in and admonish him not to disseminate the information he learned from the material to any other jurors.
>
> MR. LUCAS: I imagine as long as he doesn't take it back and he is reminded he must base this case upon the evidence of record and not the research, we would ask him to do that. I'm not one to say that there should be any certain admonishment.

(T.T. Vol. V., pgs. 941 - 942). The juror was then escorted into chambers with the judge and counsel. At that point, the following conversation took place:

> THE COURT: Have a seat and relax.

When you arrived this morning, you asked my law clerk if it was all right for you to bring these five pages of some research you had done on the internet apparently last night regarding air bag inflation devices. One article is a two-page article, air bag inflation devices, and another is a three-page article, how air bags work. You were right to bring that to my law clerk's attention. We thank you for doing that and for inquiring before you carried this into deliberations.

I have handed the articles to the attorneys of record and they have read the five pages and have come to an agreement, which agreement I join in, and that is to instruct you that, No.1, during the trial, we have instructed repeatedly that you are not to do research. And No.2, that you may not take these papers with you into jury deliberations.

And we thank you for approaching us with it before you did it. But the answer to your question is no, you may not take these five pages into jury deliberations. And thirdly, we want to tell you and instruct you that you should make your decision on this case based on all of the evidence alone, and we would ask that you not share whatever you gained from

reading these five pages to the jurors during your deliberation process.

Do you agree with that, Mr. Lucas?

MR. LUCAS: Commonwealth will agree.
THE COURT: Mr. Deriso?
MR. DERISO: Yes, Your Honor.
(T.T. Vol. V., pgs. 943-944).

As previously stated, Rule 302(a) of the Pennsylvania Rules of Appellate Procedure reads, "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." The issue currently raised by appellate counsel is waived as a motion for a mistrial was never made by defense regarding this issue. In fact, it was defense counsel who first suggested the remedy of bringing the juror into chambers and "admonish him not to disseminate the information he learned from the material to any other jurors." As such, this issue is moot.

E. Ineffective assistance of trial counsel

In the Concise Statement of Matters Complained of on Appeal, the defendant asserts four (4) grounds for which he asserts his trial counsel should be found to have been ineffective:

1. Failing to properly and/or adequately cross-examine the Commonwealth witnesses and experts;
2. Permitting the jury to continue deliberations with only eleven (11) Jurors;

3. Failing to demand a mistrial in spite of clear evidence of juror misconduct; and,
4. Inadequate preparation, including pertinent pretrial motion practice and thorough investigation.

In *Commonwealth* v. *Grant,* the Supreme Court of Pennsylvania held that "a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." 813 A.2d 726 (Pa. 2002). One ground for this ruling is that the "record may not be sufficiently developed on direct appeal to permit adequate review of ineffectiveness claims." *Grant,* 813 A.2d at 737.

In the current case, the record as it now stands is inadequate to fully review a claim of ineffectiveness against the trial counsel. Thus, this court will adhere to the ruling in *Commonwealth* v. *Grant* and hold that these four (4) grounds for relief must be raised in a PCRA Petition during collateral review and not on direct appeal.

Conclusion

This Court concludes that the Commonwealth introduced sufficient evidence together with all reasonable inferences therefrom to support the jury's finding of guilt on Homicide by Vehicle and Driving Under the Influence. The record is clear that the court did not abuse its discretion in its sound evidentiary ruling during the trial. The evidence establishes the defendant's guilt beyond a reasonable doubt and the defendant was provided a fair and

reasonable trial.

BY THE COURT:

/s/ Janet Moschetta Bell

JANET MOSCHETT A BELL, JUDGE

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

ROY M. JACOBS, II,

Petitioner

No. 371 WAL 2010

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 12th day of January, 2011, the Petition for Allowance of Appeal is DENIED.

188 10-1264
No. 10-1246 (2)
Supreme Court, U.S.
FILED
MAY 13 2011
OFFICE OF THE CLER

In The Supreme Court of the United States

KATHLEEN ALLISON, Warden,

Petitioner,

v.

STEVEN DIAZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE DISTRICT ATTORNEY OF SACRAMENTO COUNTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether it is proper to order reversal of a criminal case for inadequate assistance of counsel based on the failure to conduct reasonable investigation when the specific matter which was not investigated is a physical item which no longer exists, and therefore cannot be investigated or examined in preparation for a new trial.

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STATEMENT OF INTEREST[1]

The Sacramento County District Attorney has a significant interest in this case. Sacramento County is a jurisdiction of 1.4 million people, and the District Attorney is the chief criminal prosecutor for the jurisdiction, filing on average approximately 30,000 criminal cases per year.

This case presents issues common to all District Attorneys and prosecutors concerning not only the proper and adequate representation of persons being prosecuted, but how the District Attorney can address that issue, and the manner in which the District Attorney must process cases when there has been a reversal. Ensuring both adequate representation of persons being prosecuted, and that appropriate steps are taken to provide defense counsel with all appropriate options before and after conviction, are central to the District Attorney's mission of providing justice for both victims and defendants.

The Sacramento County District Attorney as amicus curiae submits this brief in support of the

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[1] Pursuant to Supreme Court Rule 37.2, amicus gave counsel of record for each party written notice of the intention of amicus to file this brief at least 10 days in advance. All parties consented in writing to the filing of this brief. Under Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and no person other than amicus curiae made any monetary contribution to the preparation or submission of this brief.

petition for a writ of certiorari to the Ninth Circuit Court of Appeals.

ARGUMENT

Amicus curiae agrees with the matters set out in the petition filed by the California Attorney General on behalf of petitioner here. Amicus writes separately to present additional reasons why this Court should grant a writ of certiorari in this matter. The opinion of the Ninth Circuit Court of Appeals in this case is contrary to the clear opinion of this Court. In addition, the circumstances of this case present an opportunity for this Court to clarify both the analysis to be used in deciding whether criminal defense counsel has made constitutionally permissible tactical decisions in preparation; and what remedy should be applied following habeas reversal for inadequate investigation by defense counsel.

The case arises out of a prosecution for rape. The victim made a prompt report, was examined, and a rape evidence kit was collected. Defendant was arrested shortly after the offense, and admitted having contact with the victim (he claimed she was a prostitute); the defense was not mistaken identity. Before trial, neither party sought to have the rape evidence kit tested for DNA.

I. REVERSAL BY THE NINTH CIRCUIT DUE TO FAILURE OF DEFENSE COUNSEL TO EXAMINE PHYSICAL EVIDENCE WAS NOT WARRANTED WHEN THE PHYSICAL EVIDENCE NO LONGER EXISTS

By a 2-1 vote, the opinion of the Ninth Circuit panel expressly held that respondent's "trial counsel's performance was deficient because his failure to test the DNA evidence constitutes a failure to carry out reasonable investigations. . . ." Slip opinion, p. 4. The Court further went on to conclude that in denying respondent relief, the California Supreme Court made an unreasonable application of United States Supreme Court law. Slip opinion, p. 6. The specific Supreme Court precedents cited by the Ninth Circuit were *Strickland v. Washington*, 466 U.S. 668 (1984), and *Wiggins v. Smith* 539 U.S. 510 (2003).

The analysis by the Ninth Circuit panel failed to take into consideration matters before the state courts that are pertinent to analysis here.

In seeking post-conviction relief in the state court, respondent presented the July 31, 2003 report of attorney Robert Blasier to the Sacramento Superior Court. See Appellant Steven Diaz's (respondent here) Excerpts of Record in the Ninth Circuit (hereafter ER), 55-62. Mr. Blasier reported that the biological evidence in question had been destroyed, and was no longer available for testing. Id., at ER 59-60; see also the Findings and Recommendations of Magistrate Judge Kellison in the District Court, ER 6, lines 5-7.

The destruction plainly took place after trial, when the prosecution and defense had both declined to seek DNA testing.[2]

It necessarily follows that the specific failing attributed to respondent's trial counsel – failure to conduct DNA testing before deciding on trial strategy – cannot be remedied by remand for a new trial. There is no longer any sample to test for DNA (which may or may not have been present in any sample).

Given this circumstance, amicus submits the next step in the analysis must be made under *Arizona v. Youngblood*, 488 U.S. 51 (1988). In that case, defendant was charged with the kidnap and sodomy of a 10-year-old child. The perpetrator released the child, who made a prompt report of the crime, and was examined at a hospital. A sex assault kit and the child's clothing were taken as evidence. Examination of the items revealed the presence of semen. The defense

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[2] The crime occurred February 10, 1996. The biological evidence was at the District Attorney's Crime Lab for a time, but was returned to the Sheriff's Department February 5, 1997. It was then destroyed at some unspecified time in 1997. After trial, defendant was sentenced February 13, 1997, an event that ordinarily occurs 20 judicial days (i.e. four weeks) or more after conviction, after preparation of a presentence report prepared by the probation department. See ER 56, 58-60; California Penal Code § 1191; California Rule of Court 4.411. The conclusion is that defendant was found guilty on or before January 17, and the evidence was at the crime lab for more than two weeks thereafter, before it was returned to the Sheriff's Department, where it was later destroyed.

was mistaken identity. The biological samples and clothing were not refrigerated after the initial examination, and as a result, biological testing (in the pre-DNA era) which might have excluded the defendant as the source of the semen could not later be performed. The defendant contended that the failure to properly preserve the evidence denied him due process. This Court disagreed, holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 488 U.S. at 58.

Given the above points, the decision of the Ninth Circuit is clearly contrary to the decision of this Court in *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770 (January 19, 2011). *Harrington* gave definition to the application of the federal habeas statute, 28 U.S.C. § 2254, under which respondent here sought relief.

In the instant case, the California Supreme Court denied respondent habeas relief without explanation or comment. ER 3, lines 20-21. In a situation where (as here) a state supreme court has denied habeas relief without explanation, *Harrington* stated:

> . . . a [federal] habeas court must determine what arguments or theories supported, or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this [U. S. Supreme] Court. . . . As a condition for

> obtaining habeas corpus relief from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.
>
> 131 S.Ct. at 786-787.

In the circumstances in the case at bar, that burden cannot be met. The California Supreme Court could readily have decided that, regardless of any conclusion one might reach with the benefit of hindsight as to trial counsel's decision to forego DNA testing, it is impossible for any defense counsel on reversal and remand to now decide trial strategy based on DNA testing. The testing cannot be done.

Since any new trial would be done without the benefit of DNA testing, the question then becomes whether the denial of DNA testing, by virtue of the failure to preserve the evidence, denies respondent due process. *Youngblood* answers that question in the negative. The California Supreme Court could reasonably have concluded that a defendant is not entitled to a new trial so his defense counsel can have the benefit of deciding trial strategy based on the testing of physical evidence that no longer exists. Certainly, no established precedent from this Court holds to the contrary. Neither *Strickland*, supra, nor *Wiggins*, supra, relied on by the Ninth Circuit, relate to the investigation of physical evidence, much less to the

examination of physical evidence that no longer exists.

Taking the analysis a step further, the instant case presents an opportunity for this Court to decide the substantive point of whether reversal is appropriate when the perceived inadequate performance of defense counsel in failing to investigate before trial cannot be remedied on remand, because the circumstances (i.e. post-trial destruction of physical evidence without bad faith) no longer permit the proposed investigation to occur. Amicus submits that in such a circumstance, the rule of *Youngblood*, supra, should govern – reversal is not warranted unless the defendant can demonstrate more than speculation as to a favorable test result, and bad faith destruction of evidence on the part of the government. A contrary result in a case such as the one at bar would mean that the defendant is granted a reversal only to get the same trial he got the first time – a trial without the benefit of DNA testing results.

II. THE NINTH CIRCUIT FAILED TO GIVE DUE DEFERENCE TO THE TACTICAL CHOICE MADE BY DEFENSE COUNSEL NOT TO CONDUCT DNA TESTING WHEN IDENTITY WAS NOT AN ISSUE IN THE CASE

This case also presents an opportunity for this Court to further define the standard for habeas review of the performance of defense counsel as a matter of constitutionally adequate assistance of

counsel. Extending the analysis in *Harrington*, supra, to circumstances involving the choice by defense counsel whether to conduct DNA testing, competent defense counsel could elect not to pursue DNA testing in this circumstance. Identity was not an issue. Had the defense pursued DNA testing, it might have prompted the prosecution to pursue its own DNA testing, with a serious risk that the results would undermine the defense case. See *Harrington*, supra, 131 S.Ct. at 789-790. Under this circumstance, the tactical choice of defense counsel should be given deference in reviewing the constitutional adequacy of his performance.

CONCLUSION

Based on the foregoing, as well as the reasons put forth in the petition for certiorari, amicus curiae respectfully requests that this Court grant certiorari, and reverse the decision of the Ninth Circuit Court of Appeals.

DATED: May 13, 2011

Respectfully submitted,

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